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In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA, PETITIONER

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit reversing the respondents' convictions and remanding for a new trial.

OPINIONS BELOW

The opinions of the court of appeals (App. A., *infra*, pp. 1a–38a) are reported at 426 F. 2d 32; its opinion denying rehearing and the order of the court denying rehearing *en banc* are unreported (App. C., *infra*, pp. 40a–43a). The opinion of the district court denying defendant's motions for judgments of acquittal notwithstanding the verdict, or for a new trial is reported at 281 F. Supp. 837.[1]

[1] Pre-trial opinions in this case are reported at: 205 F. Supp. 94 (denial of defense motions to stay the prosecution pending completion of related Federal Trade Commission proceedings); 217 F. Supp. 199 (denial of defense motions to strike allega-

JURISDICTION

The judgment of the court of appeals reversing the judgments of conviction was entered on April 16, 1970. The orders of the court denying the government's timely petition for rehearing and denying rehearing *en banc* were entered on December 1, 1970. On December 21, 1970, Mr. Justice Harlan extended the time within which to file a petition for a writ of certiorari to and including January 30, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in reversing criminal convictions by a jury in a major and complex antitrust conspiracy case because of alleged errors in the instructions, the court of appeals applied an improper standard of review by considering particular language in isolation rather than evaluating the charge in its entirety in the light of all the evidence and the defendants' arguments to the jury.

2. Whether the trial judge:

(a) properly (i) permitted both sides to argue to the jury the significance of the conduct of an unindicted firm in the industry while barring defendants from discussing that firm's presumption of innocence, and (ii) charged the jury that it may consider the

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tions of unreasonably high profits and prices from the indictment and to dismiss the monopolization count); 245 F. Supp. 801 (granting motions of the individual defendants to dismiss the indictment as to them on the ground that they were immune from prosecution); 1967 Trade Cas. ¶72,170 (denial of defense motions to dismiss the indictment for prejudicial delay in impaneling the grand jury which returned it and for discovery of the Justice Department's internal memoranda which bore on the alleged delay).

conduct of the unindicted firm but is to draw no inferences from the fact that it was not indicted;

(b) unduly stressed an inflammatory issue when it told the jury that it may consider defendants' high profits and uniformly high prices along with other evidence bearing on the charge of conspiracy;

(c) should have charged that before the jury can convict it must find false the denials of illegal agreement by defendants' officials;

(d) in his charge unduly emphasized the patent aspects of the case, inaccurately described patent license arrangements among defendants and co-conspirators and improperly explained the significance of preconspiracy conduct by one of the defendants.

STATUTE INVOLVED

Sections 1 and 2 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. 1 and 2) provide in pertinent part:

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.
>
> § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT

In this criminal antitrust case a jury convicted three corporations, Chas. Pfizer & Co., Inc. ("Pfizer"), American Cyanamid Company ("Cyanamid") and Bristol-Myers Company ("Bristol") under a three-count indictment of (1) conspiring to restrain, (2) conspiring to monopolize, and (3) monopolizing trade in four broad-spectrum antibiotic drugs, in violation of Sections 1 and 2 of the Sherman Act.[2] The indictment also described Olin Mathieson Chemical Corporation ("Squibb") and the Upjohn Company ("Upjohn") as co-conspirators. Each defendant was fined the maximum of $50,000 on each count.

A divided panel of the court of appeals reversed and remanded for a new trial, primarily because of errors in the instructions to the jury (426 F.2d 32; App. A, *infra*, pp.1a–38a). The full court initially granted the government's petition for a rehearing *in banc* (App. B, *infra*, p. 39a) but vacated its order, 4–3 (App. C, *infra*, pp. 40a–43a), after the panel rendered a second opinion (App. C, *infra*, pp. 41a–42a) denying rehearing but modifying its earlier ruling.

The Facts

The facts are stated in the light most favorable to the verdict.

Tetracycline and the broad spectrum antibiotic market. The product market consisted of four clinically interchangeable "wonder drugs": ***chlortetracycline,*** patented by Cyanamid in 1949 and manufactured and sold exclusively by it under its brand name "Aureomy-

[2] The principal official of each company also was indicted, but the charges against them were dismissed on the ground that they had acquired immunity by testifying before a grand jury. *United States* v. *Chas. Pfizer & Co.*, 245 F. Supp. 801.

cin"; *chloramphenicol,* patented by Parke, Davis & Company in 1949 and manufactured and sold exclusively by it under its brand name "Chloromycetin"; *oxytetracycline,* patented by Pfizer in 1950 and manufactured and sold exclusively by it under its brand name "Terramycin"; and *tetracycline,* first marketed by Cyanamid in 1953 but ultimately patented by Pfizer in 1955. During the period of the conspiracy, November 1953 to August 1961, six companies manufactured or sold these drugs: Pfizer, Cyanamid, Bristol, Squibb, Upjohn, the alleged conspirators; and Parke, Davis which was not charged or named as a conspirator.[3] Total broad spectrum antibiotic product sales from 1954 through 1961 amounted to more than $1.1 billion.[4]

Tetracycline, the last drug to be introduced, was the keystone of the market's price structure. Unless its production could be restricted and its price controlled, unrestrained competition threatened to reduce drastically the price of all broad spectrum antibiotic drugs, as experience with unpatented penicillin had demonstrated.[5] Thus the indictment charged (Ind., ¶45; 33a) that the conspiracy was directed at controlling the manufacture and sale of tetracycline, with the underlying broader objective of maintaining uniform prices on all broad spectrum antibiotic products.[6]

Proof of the conspiracy was entirely circumstantial. It focused on four principal circumstances: (1) a patent interference settlement and cross-licensing ar-

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[3] Ct. X 4, pp. 2–3; 6692a–6693a. (Page numbers followed by "a" refer to pages in the twenty-one volume joint appendix.)

[4] GX 875; 10244a.

[5] 3686a–3688a.

[6] Total tetracycline product sales constituted 45.7 percent of all broad spectrum antibiotic product sales in 1954, 66.8 percent in 1957 and 56.2 percent in 1961 (GX 877; 10246a).

rangement between Cyanamid and Pfizer and the sale of bulk tetracycline by Cyanamid to Pfizer in November 1953–January 1954; (2) certain misrepresentations made by Pfizer and Cyanamid to the Patent Office, which resulted in the issuance of the patent on tetracycline to Pfizer in January 1955; (3) the settlement in December 1955 of various suits between Pfizer and Bristol, Squibb and Upjohn involving the validity of the tetracycline patent, and Pfizer's simultaneous grant of licenses under the patent to Bristol to manufacture and sell, and to Squibb and Upjohn to package and sell only; and (4) the uniform published prices on the antibiotic drugs, which were unchanged despite shifting market shares, varying costs and sales gains by high cost producers, and despite a large gap between production cost and sales price which left ample room for price cuts designed to increase or regain market shares.

The Pfizer-Cyanamid arrangements and the patent on tetracycline. At meetings in November 1953, Pfizer and Cyanamid settled an impending interference proceeding between them. They agreed to exchange proof of priority, that the "loser" would concede priority, and that the "winner" would license the "loser" under its tetracycline patent.[7] In addition, Pfizer received bulk tetracycline with which to enter the market[8] (Cyanamid had begun manufacture first), a li-

[7] In late 1953, when Pfizer and Cyanamid negotiated these agreements, they together dominated the broad-spectrum antibiotic market. In 1953 Pfizer (Terramycin) and Cyanamid (Aureomycin and tetracycline) accounted, in approximately equal shares, for 92.1 percent of total broad-spectrum antibiotic product sales (GX 909; 10287a).

[8] 2303a, 2392a–2405a, 2456a–2458a, 2772a–2773a; GX's 285–295, 644; 8785a–8795a, 8972a.

cense to produce Aureomycin (chlortetracycline) to use as the base in the production of tetracycline, and Cyanamid's know-how and most efficient bacteria culture for Aureomycin production. After an exchange of proofs of priority, Cyanamid conceded priority to Pfizer.[9]

Bristol had applied for a patent on a salt form of tetracycline[10] and a second interference was declared involving Bristol, Pfizer and Cyanamid.[11] The examiner handling this proceeding suspected that tetracycline was co-produced with Aureomycin and that no invention was therefore involved in identifying it.[12] Both Pfizer and Cyanamid separately made misrepresentations to the patent examiner to overcome his suspicions. Their efforts were successful and Pfizer received the tetracycline patent in January 1955.[13]

Pfizer's arrangements with Bristol, and the Squibb-Upjohn licenses. In December 1955 Pfizer and Bristol reached an understanding under which Pfizer agreed to license Bristol to manufacture and sell tetracycline, and to license Squibb and Upjohn, Bristol's bulk customers, to purchase and sell, but not to manufacture the drug. They also settled infringement suits which Pfizer had brought against Bristol, Squibb and Upjohn, and the latter's counter suits for declaratory relief against Pfizer.[14]

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[9] GX 7, pp. 6–7; 7561a–7562a.

[10] GX 10; 7889a–7916a.

[11] GX 12, pp. 1–2; 8094a–8095a.

[12] See GX 5, p. 47; 7504a; GX 12, pp. 443–444; 8293a–8294a; 4400a, 4409a–4410a; GX 4, pp. 34–36; 7404a–7406a.

[13] GX 3; 7365a–7367a.

[14] GX 15; 8383a–8384a; GX 16; 8385a–8386a; GX 17; 8387a–8388a; GX 18; 8389a–8390a; GX 19; 8391a–8392a; GX 20; 8393a–8395a.

Bristol was able to negotiate for Squibb and Upjohn because it had previously made agreements with them under which they agreed to purchase their tetracycline requirements from Bristol for the duration of the infringement litigation plus three years, and Bristol assumed all liability for infringement; Squibb and Upjohn agreed not to settle or negotiate directly with Pfizer. Bristol also promised to obtain for them a license "which may, however, be limited to your right to purchase, use and sell tetracycline ~~to the~~ drug trade."[15] It was able to settle with Pfizer because of a threat to use a wire-tapping episode in the infringement litigation.[16] Bristol received an unlimited license under the tetracycline patent and obtained non-manufacturing licenses for Squibb and Upjohn which had to look to Bristol for their bulk supplies.

The result of the patent and licensing arrangements was that Pfizer had the controlling patent, only Cyanamid and Bristol had licenses to manufacture, and Squibb and Upjohn had the "right" to process and sell what they purchased from Bristol. The government contended that Pfizer, Cyanamid and Bristol had agreed that only they would manufacture tetracycline, that only Bristol would sell in bulk, but only to Squibb and Upjohn (Ind. ¶45; 33a).

Parke, Davis, the other major manufacturer of broad-spectrum antibiotics, never made or sold tetracycline and played no part in any of the above transactions. Parke, Davis rejected Bristol's invitation to become Bristol's second bulk customer for tetracycline.[17]

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[15] GX 108; 8698a–8705a (Bristol-Upjohn); GX 83; 8639a–8647a (Bristol-Squibb).

[16] 2515a–2517a, 2633a, 2889a–2890a, 3135a–3137a.

[17] 2894a–2895a, 3317a–3318a.

Identical Pricing. Control of tetracycline having been assured, the published prices on all broad spectrum antibiotic drugs remained substantially identical and unchanged from 1953 to 1960,[18] despite the steadily expanding role of tetracycline as each company, except Parke, Davis, introduced it into the market. Prior to 1951 the published prices on broad-spectrum antibiotics had been reduced in response to the introduction of a new product.[19] But the price on tetracycline was maintained at the prices for broad-spectrum antibiotics in effect in January 1954, although individual companies' market shares shifted substantially during this period, and the demand fluctuated.[20] Pfizer and Cyanamid actually lost market shares to the higher cost sellers, Squibb and Upjohn.[21] Sales prices were many times higher than production costs[22]—a fact which, according to the government, would have permitted profits even if prices were cut to preserve or increase market shares. This fact, together with defendants' adherence to a uniform price despite differing costs[23] and shifting market shares, formed the basis for the allegations in the indictment that defendants' prices and profits were "unreasonably high."

The Trial and Verdict

The trial lasted nine weeks; the printed record contains more than 12,000 pages. The government's case involved three broad categories of proof: (1) data bear-

[18] GX's 920–927, 930; 10310a–10318a, 10324a.

[19] 2746a–2748a.

[20] See GX's 876, 877; 10245a, 10246a.

[21] *Id.*

[22] *Compare* GX 934; 10325a, *with* GX's 921, 922; 10311a, 10312a.

[23] GX 934; 10325a.

ing on prices, production costs, gross profits and market shares; (2) testimony of defendants' officials concerning the various arrangements among the defendant companies and co-conspirators; and (3) testimony and documents relating to the misleading of the patent examiner. Defendants' strategy was to develop their defense largely through cross-examination of their own officials during the government's case. Pfizer called one witness; the other defendants offered no evidence after the government's case was completed. The district court (Judge Frankel) delivered a lengthy charge, and the jury returned guilty verdicts. Relevant portions of the charge are discussed below.

The Opinions and Orders of the Court of Appeals

In reversing the convictions, the court of appeals held that the instructions to the jury were erroneous in five respects; and that on one of those five issues the trial court had improperly restricted the defendants' ability to argue to the jury:

First, the case was submitted to the jury on a different theory from that specified in the indictment and the bill of particulars. The court interpreted these documents as charging that specific agreements had been entered into at specific meetings between specific individuals, *i.e.*, at the Pfizer-Cyanamid meetings in November 1953 and the Pfizer-Bristol meetings in December 1955. But the charge treated the case as based upon a general course of conduct throughout the years, thus misleading both the jury and the defense.[24]

[24] 426 F. 2d at 34, 36, 37, 38–43, 47–48; App. A, *infra*, pp. 4a, 7a, 10a–11a, 13–22a, 32a–33a.

Second, because the case was based upon specific agreements, the testimony of defendants' officials denying the existence of any illegal agreements or understandings was crucial and the jury should have been told that in order to convict it had to find that those officials had lied. The instructions also unduly stressed the evidence relating to unreasonably high prices and profits and fraud on the Patent Office, thereby distracting the jury's attention from whether the participants had entered into illegal agreements at the meetings.[25]

Third, the trial judge had improperly restricted the defendants' ability to ask the jury to draw inferences favorable to them from similarities between their conduct and that of Parke, Davis, which was not a conspirator; and the charge to the jury unfairly depreciated the significance of comparisons with Parke, Davis.[26]

Fourth, the instructions concerning Pfizer's arrangements with Bristol for licenses by the former to Squibb and Upjohn could have conveyed the impression that the licenses on their face contained a ban against manufacture when in fact the only bar to manufacture was the patent. This might have led the jury to conclude from the agreements themselves that Pfizer and Bristol had illegally imposed restrictions on Squibb and Upjohn, even though the agreements themselves were concededly lawful and their illegality depended upon other factors.[27]

Fifth, the charge should have stated that Bristol's activities prior to its alleged entry into the conspiracy

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[25] 426 F. 2d at 40–41 43, 48; App. A, *infra*, pp. 16a–18a, 22a, 32a–33a.

[26] 426 F. 2d at 43–45; App. A, *infra*, pp. 22a–26a.

[27] 426 F. 2d at 45–46; App. A, *infra*, pp. 26a–29a.

in December 1955 could not be considered "as proof of Bristol's being in any conspiracy." This, together with the charge that it was unnecessary to prove the precise dates of the conspiracy, might have led the jury to conclude that Bristol had joined the conspiracy prior to that date.[28]

Judge Hays, dissenting,[29] concluded that the evidence was sufficient; that the instructions on patent fraud and unreasonably high prices were proper; that it was quite unlikely that the jury was misled by the instructions on Parke, Davis, or the licenses to Squibb and Upjohn; and that the jury could find that Bristol agreed to exclude competitors.

Following the grant of the government's petition for rehearing *in banc*, the panel issued a short opinion (App. C, *infra*, pp. 41a–42a) denying rehearing. The panel stated that the instructions permitting the jury to find a conspiracy from defendants' course of conduct were proper, and that "we do not rely upon the express agreement contention as a ground for reversal." It concluded, however, that "taken as a whole" the other errors found denied the defendants a fair trial. These errors related to the Parke, Davis defense, to the truth or falsity of defendants' testimony about the November 1953 and December 1955 meetings and to the "undue emphasis on the excess of selling prices over factory costs." The court stated that if reversal for these errors were not required, it would then have to consider "many other contentions" of the defendants, one of which was Bristol's argument that there was insufficient evidence to warrant submission to the

[28] 426 F. 2d at 46–47; App. A, *infra*, pp. 29a–32a.

[29] 426 F. 2d at 48–50; App. A, *infra*, pp. 33a–38a.

jury of the question whether Bristol conspired with Pfizer and Cyanamid to exclude others from the tetracycline market. The court "incline[d]" to that view and stated that it would require a new trial.

On the basis of the opinion denying rehearing, the full court, dividing four to three, denied rehearing *en banc* (App. C, *infra*).

REASONS FOR GRANTING THE WRIT

1. This is one of the most important criminal antitrust cases in recent years. After a nine-week trial (the printed record of which contains 12,000 pages), a jury convicted three of the country's leading pharmaceutical manufacturers of conspiring to fix prices on widely used and vital antibiotic drugs, the conspirators' sales of which were $855 million of the industry's total of $1.1 billion (GX 875, 10244a); and of conspiring to monopolize and monopolizing the production and sale of those drugs. The matter was submitted to the jury under a lengthy charge by a highly regarded district judge which, we believe, fairly and clearly explained the issues to be decided, the governing legal principles and the significance of the evidence produced by both sides. A divided court of appeals reversed the convictions on the ground that the judge had committed reversible error in certain of his instructions, and remanded for a new trial; the court denied rehearing *en banc* by a four-to-three vote.

On its face, the initial opinion of the court of appeals appears to involve only the application of settled principles of antitrust and criminal law to these particular facts; it does not cite a single decision. But the case involves far more than that. The

indictment of the defendants followed an extensive congressional investigation of their pricing practices on these vital antibiotic drugs[10]—an inquiry that reflected deep public concern over practices in an industry whose operations are crucial to the nation's health—and a lengthy Federal Trade Commission proceeding relating to the same matters.[11] As we show below, the instructions that the court of appeals' decision requires a district judge to give in cases of this type would place an unwarranted and serious burden upon the government in the prosecution of criminal antitrust cases involving price fixing and other restrictive practices in oligopolistic industries, where there rarely is direct proof of the conspiracy and the government almost invariably has to rely upon circumstantial evidence.

There was no dispute in this case about what the defendants did or that, if their actions were the result of a combination or conspiracy rather than independent decision, they violated the law. The jury had before it a great amount of evidence concerning the defendants' pricing practices, the circumstances surrounding the issuance of the patent on the last of these drugs to be marketed, and the limited scope of

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[10] Report of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, "Administered Prices—Drugs," S. Rep. No. 448, 87th Cong., 1st Sess. (1961); *United States* v. *Charles Pfizer & Co.*, 245 F. Supp. 801, 805-807 (S.D.N.Y.).

[11] *Matter of American Cyanamid Co., et al.*, 63 FTC 1747, vacated and remanded, *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757 (C.A. 6), *Matter of American Cyanamid Co., et al.* [1967-1970 Transfer Binder], Trade Reg. Rep. ¶18,077, affirmed *Chas. Pfizer & Co.* v. *Federal Trade Commission*, 401 F.2d 574 (C.A. 6), certiorari denied, 394 U.S. 920.

the few licenses that the defendants had issued, as well as defendants' explanations that their conduct simply reflected independent business judgment, and their denials of illegal agreement. It concluded that defendants' conduct reflected concerted endeavor rather than individual business judgment. On the evidence in this case, that conclusion was fully warranted—in short, this is not a "fact" case in the sense that there can be no question that the proof here supports the jury's verdict.

In a case such as this, the trial judge necessarily must have considerable leeway in charging the jury. A conviction should not be reversed merely because appellate judges conclude that in some respects the language in the charge could have been more specific, or that the judge should not have emphasized some things quite as much as he did or should have given greater weight to others. When price fixing occurs in oligopolistic industries, the conspirators are seeking to insure themselves against competitive deviations from the administered prices which tend to supplant classic market forces as the competitive norm. In such cases, all that the court's charge should be required to do is to explain fairly and clearly in a way that the average man can understand what the law is, what issues the jury must decide and upon what basis it should do so.

The emphasis given particular portions of the charge and their validity must be gauged in the light of the entire trial, the complexity of the evidence and the charge as a whole. Language that might seem erroneous and significant if viewed in isolation frequently turns out to be either permissible or, if erroneous, not prejudicial when viewed in the broader context.

Cf. *Andres* v. *United States*, 333 U.S. 740, 745; *Kotteakos* v. *United States*, 328 U.S. 750, 763; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242. Judged by this standard, we submit that the trial judge's instructions here fairly and adequately presented the case to the jury, and that the court of appeals should not have reversed the convictions. We discuss below our reasons for this conclusion.

Beyond this, however, we believe that this is one of those unusual situations in which, because of the inherent importance of the case to the public interest and the serious consequences for future criminal antitrust enforcement that the court of appeals' approach to reviewing the trial judge's instructions portends, it is important for this Court to review that court's decision.

2. (a) Parke, Davis, one of the four principal firms manufacturing and selling broad-spectrum antibiotic drugs, was neither indicted nor named as a conspirator. Certain of Parke, Davis's practices (identity of prices, package-size, dosage forms, and marketing techniques) paralleled those of the defendants who, the government claimed, had acted pursuant to a conspiracy. Others were different. It never handled tetracycline. It never licensed anyone to manufacture or sell its patented antibiotic, Chloromycetin; it never obtained a license for the manufacture or sale of any other broad-spectrum product; it never bought or sold such products in bulk; indeed, it declined Bristol's offer to furnish it bulk tetracyline; and it was not involved in the patent interferences or settlements, the cross-licensing agreements, or the various meetings and negotiations between Pfizer and the other conspirators concerning tetracycline.

One of the defendants' major contentions at the trial was that the fact that a non-conspirator did some of the same things they did showed that their actions did not result from conspiracy. Extensive evidence was introduced relating to Parke, Davis. Two of the defendants briefly argued the point to the jury, the court gave the jury an instruction on it, and twice during its deliberations the jury requested and received evidence relating to Parke, Davis. The court of appeals held that the district court committed reversible error in restricting the defendants' ability to argue the point to the jury and in its instructions on the issue. In the light of the entire record, however, we submit that the trial court properly and appropriately handled this issue.

The defendants wanted to stress to the jury the presumption of innocence covering Parke, Davis. The trial court declined to permit that argument (4646a) but informed counsel (*ibid.*) that "in arguing the evidence to the jury both sides are entitled to deal with the reality that a substantial factor in this relevant market is Parke, Davis," and that—

> I will allow everybody to risk arguments in summation based on comparisons between the defendants and Parke, Davis. I have indicated to you that I think there is a risk in that to which the defendants ought to be peculiary sensitive.
>
> I must allow the government, if I allow the defendants to do this, to argue the differences at least in rebuttal between Parke, Davis and the alleged conspirators.

In their arguments to the jury, counsel for American Cyanamid and for Pfizer each referred briefly

to Parke, Davis. Cyanamid's counsel first discussed the evidence that Parke, Davis, "not claimed to be a conspirator," had reduced its prices to meet those of the defendants and that the defendants in turn had reduced their prices to meet Parke, Davis's reductions (4758a). He also pointed out (4759a) that a Parke, Davis official, Loynd "who isn't charged in any wrong-doing, specifically denied that there was any agreement with anybody about how he priced his goods, and I suspect if you remember Mr. Loynd you would agree, looking at him, that that would unquestionably be true" (4759a). Finally, he pointed out (4770a) that while Cyanamid "did not sell its antibiotic materials in bulk * * * it is true of Parke, Davis also." Pfizer's counsel referred to Parke, Davis's meeting Pfizer's own price reductions and argued that the reason for this price parallelism was that "It is clear from the acts of Lederle and Parke, Davis and it is not claimed there was any conspiracy between them, that neither of them wanted to be undersold by its competitors in terms of catalog price and Mr. Loynd testified that that was the case" (4811a).

Thus, defense counsel pointed out to the jury that Parke, Davis, which was not a conspirator, did many of the same things done by the defendants that, according to the government, resulted from conspiracy. Counsel might have argued the point more vigorously but their approach may have reflected concern over the judge's warning that pressing too hard could have led to strong rebuttal from the government emphasizing the differences between the conduct of Parke, Davis and the defendants. The limited references the defendants made in their closing argument to Parke, Davis seem more probably to have reflected their own

trial strategy rather than any limitation they believed the district judge had placed upon them. They had full opportunity to, and did, argue the significance of Parke, Davis not having been indicted and of that firm's parallel practices.

The pertinent portion of the judge's charge respecting Parke, Davis was as follows (5001a–5002a; App. D, *infra*, pp. 108a–109a):

> I come to one final observation I want to make in these instructions about something included in the evidence you have heard. There has been evidence about Parke, Davis and about Chloromycetin, the broad spectrum antibiotic which is alleged to have comprised part of the market involved in this case. You have learned that Parke, Davis was a substantial factor in that market, and I have mentioned the possible significance of that situation as it affects the question of monopoly and may affect other issues in this case. We have heard of various respects in which the practices of Parke, Davis as to dosages and prices and marketing techniques paralleled those of the defendants and of Squibb and Upjohn. We have also heard some evidence and argument concerning the differences between Parke, Davis and the defendants on trial here. You are aware, as counsel for both sides have stated, that Parke, Davis is not alleged to have been a member of the conspiracy charged by the government.
>
> Now, insofar as Parke, Davis and its activities were material factors in the market which concerns us in this case, the facts about that subject have been placed before you and are part of the total evidence you may consider in reaching your judgment. However, the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direc-

> tion as a fact in itself. There is no profit here in speculating as to why Parke, Davis was not indicted. Parke, Davis is not on trial here, and the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them as they have been presented to you in this courtroom.

In view of defense counsel's references in their arguments to the fact that Parke, Davis was not a conspirator but did the same things that the government charged were the result of conspiracy when done by the defendants, the court's statement that the facts about "Parke, Davis and its activities * * * in the market * * * have been placed before you and are part of the total evidence you may consider in reaching your judgment" adequately informed the jury as to what consideration this evidence should be given. The court properly declined to permit the jury to "specula[e] as to why Parke, Davis was not indicted" or to point out, as the court of appeals apparently required, that it was innocent; had the court stressed those points, the jury might have drawn the impermissible inference that the mere indictment of the defendants carried some implication as to their guilt. The court's instruction correctly avoided this dilemma by telling the jury that the Parke, Davis evidence was part of the total picture it was to consider in determining whether the defendants' actions were the product of conspiracy or individual decision. Because the industry involved here is oligopolistically structured, price uniformity without agreement is expected by economic theory for a limited period of time. But that it should persist for more than half a decade, in the absence of any type of agreement among some of the leaders

in the oligopoly is questionable."[32] The issue was thus properly submitted to the jury. That the jury considered the evidence relating to Parke, Davis is shown by the fact that twice during its deliberations it requested evidence relating to that company.

(b) The court of appeals further erred in holding improper the instructions dealing with the government's contention that the defendants had charged "unreasonably high" prices on and made "unreasonably high" profits from the sale of broad-spectrum antibiotic drugs.

The trial judge told the jury that the defendants could charge any price they wished in the absence of agreement, but that it might consider whether the prices on broad-spectrum antibiotic products were "unreasonable" (which, the court explained, meant "unusual," "artificial" or "extraordinary") in the sense that they appeared to be unrelated to various market factors. He referred to the government's attempt to show, through the cost and profit evidence, that defendants' prices and profits were unreasonably high compared to their production costs, to their gross profits on other products, and to Squibb's and Upjohn's gross profits, and to the evidence that defend-

[32] "* * * in practice it appears that firms selling in such a market do not always seek a uniform monopoly price and, if sought, do not always attain it. Among the reasons why uniform monopoly prices are not sought or attained is that one seller may believe he can maximize his profits by expanding his total sales rather than taking a maximum profit on each sale. Also, even the mere addition of one seller to an oligopoly market makes the market more complex and less predictable. Therefore, there may be competitive actions and reactions in an oligopoly market." *Northern Natural Gas Co.* v. *Federal Power Commission*, 399 F. 2d 953, 965–966 (C.A.D.C.) (footnote omitted). See, also, *C-O-Two Fire Equipment Co.* v. *United States*, 197 F. 2d 489–493 (C.A. 9), certiorari denied, 344 U.S. 892.

ants' prices had remained stable despite variations in production costs of each seller and among the several sellers, and changes in overall demand and relative market share. He told the jury that production costs omitted cost items that should be included to calculate net profits, and reminded them of the defendants' contentions that gross profit data are misleading and meaningless, that their prices were in no way unreasonable or artificial, and that competition often results in price uniformity despite variations in production costs among sellers. Finally, he instructed that if the jury did not find defendants' prices and profits unreasonable, it should not consider that allegation; but that if it did find prices and profits unreasonable, that could be a factor, together with all the other circumstances, that would support an inference of an agreement on price, and would also tend to support the monopolization charge.[33]

The district court did not preclude the defendants from introducing any evidence relating to their total costs. It is true that the court did refuse to permit the defendants to present such evidence in connection with their cross-examination of the government's witnesses, but this ruling simply involved a determination of the order of proof and the need to authenticate the cost figures; the court required that the cost information be presented by the accountants responsible for the studies.[34] The defendants, of course, could

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[33] 4993a–4999a, App. D, *infra*, pp. 100a–106a.

[34] 1848a–1849a, 1988a–1990a. The government's evidence relating to costs and profits was taken from records the companies kept in the regular course of business. Pfizer and Bristol kept no business records showing "total" costs and net profits by products; Cyanamid did have business records of this type,

have introduced this evidence as part of their defense,[35] but for reasons best known to themselves they declined to do so; in effect, they elected to let the jury decide the case on the basis of the government's evidence relating to costs and profits. The court of appeals was thus in error in stating that "90% of the material essential to an accurate determination of costs [was] withheld from the jury by exclusion" (426 F. 2d at 43, App. A, *infra*, p. 22a); whatever was "withheld from the jury" was not "by exclusion" but as a result of the defendants' own choice.

The district judge's charge relating to high prices was carefully designed to avoid any "inflammatory" (426 F. 2d at 43; App. A, *infra*, p. 22a) effect this subject might have had. He cautioned that high prices do not themselves establish a conspiracy and he gave content to the term "unreasonably high prices" by referring to the other factors relating to this issue, namely, the uniformity of price among the defendants, the relation of prices to production costs, cost variations among the defendants, shifting market shares, and supply and demand.

In cases where proof of price fixing or attempted monopolization depends upon circumstantial evidence—as is likely in oligopolistic industries—the government frequently must rely upon evidence that the defendants charge uniformly high prices. Such evi-

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and the government introduced them in evidence. See the district court's post-trial opinion, 281 F. Supp. 837, 844–845, footnote 9. The studies showing "total" costs defendants attempted to introduce as a part of cross-examination during the government's case were special accounting studies prepared for use in a related Federal Trade Commission proceeding.

[35] See 998a–999a, 1687a–1688a, 1707a–1708a, 1849a, 1989a, 2205a, 4564a–4565a.

dence is highly relevant; the fact that the defendants charge such prices and do not reduce them in an attempt to gain a larger share of the market is a pertinent factor for the jury to consider, with the other evidence, in deciding whether the maintenance of such prices reflects only individual business judgment. The district court's charge on that issue in this case fully and fairy set forth the significance of these facts and the weight the jury was entitled to give to them. See, *e.g.*, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 804–806.[36] If, as the court of appeals suggests, the giving of such an instruction is reversible error, the government's ability successfully to prosecute price fixing and monopolization cases in oligopolistic industries would be seriously weakened.

(c) In its initial opinion the court of appeals held that the bill of particulars had limited the charge in the indictment to a conspiracy formed at specific meetings, and that the instructions were erroneous because they permitted the jury to convict on the basis of a conspiracy inferred from a general course of conduct. Officials of the defendants had denied on the stand that they had entered into any "agreement" at those meetings. As a corollary to its holding on the specific agreement point, the court of appeals ruled that the jury also should have been told that, in order to convict, it had to find that the defendant officials had testified falsely when they said there had been no "agreements" made at the meetings.

In rejecting the theory of specific agreement in its opinion on rehearing, the court of appeals also cut out the ground upon which the need for an instruction on

[36] The authorities are extensively discussed in the district court's post-trial opinion. 281 F. Supp. 837, 846–848.

false testimony rested. Since that opinion indicates, however, that the court of appeals still may believe that such an instruction was required, and since the giving of that instruction would introduce an unnecessary, confusing and prejudicial element in the future trial of antitrust cases, we show briefly why that instruction was not required and why the trial court's instructions on the point were proper.

Whether an "agreement" illegal under the Sherman Act has been made is a mixed question involving both factual and legal elements *United States* v. *Gypsum Co.*, 333 U.S. 364, 396.[37] In cases of this type, officials of defendant companies frequently deny that they had entered into any illegal agreements. Such a statement, however, may rest upon the witness' view as to what is necessary to constitute an illegal agreement. In deciding whether the defendants in an antitrust case have agreed to restrain or monopolize trade, the jury is not required to decide whether the witnesses who denied the making of such agreement committed perjury. Rather, the denials are just one factor that the jury must take into account in the light of all the evidence bearing on the issue.

The district court properly applied that standard in its instructions covering this testimony. It told the jury (5000a–5001a; App. D, *infra*, p. 108a):

> Along with all the other evidence in the case, you have heard the sworn testimony of the principal officers of the three defendant companies, and you have heard each of them deny in broad terms that there was any understand-

[37] See also, *United States* v. *General Motors*, 384 U.S. 127, 141, n. 16; *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44–45; *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194, n. 9.

ing or agreement among them, either express or implied, that there would be uniform and identical prices, or that there would be any exclusion of competitors, or that they would seek together in any way to achieve monopoly power. You must, obviously, give due and deliberate thought to this testimony, and ultimately attribute to it such weight as it permits in your impartial judgment. In performing this task, you will have in mind the definition of a combination or conspiracy as it has been given to you in these instructions, recalling, among other things, that the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter. * * *

This is by no means to suggest to you that you overlook or reject the sworn testimony of defendants' officers. That's for your judgment, not mine. The point being made here, as you understand, is that assertions of innocence by such officers may reflect partly legal as well as factual contentions and must be weighed along with all the evidence of every kind that has been submitted to you.[25]

See, also, the court's discussion of these instructions in its opinion denying the defendants' motions for

[25] A substantially similar charge was sustained in *United States* v. *American Radiator and Standard Sanitary Corp., et al,* (C.A. 3, Nos. 18,182–18,187, decided September 23, 1970), slip decision p. 43, now pending on petitions for writs of certiorari (Nos. 1047–1050, this Term). The Third Circuit noted the ruling on this point in *Pfizer*, but observed that the defendants before it had not preserved the point. It also viewed *Pfizer* as factually distinguishable.

acquittal notwithstanding the verdict or for a new trial. 281 F. Supp. 837, 849–850.

The court's statement that "the final answer to this central question in this case [whether there was a conspiracy] must be based upon the actual conduct of the defendants during the period covered by the indictment" applied the principles this Court has repeatedly announced. See, *e.g.*, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44; *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 195.

(d) Finally, the court of appeals held that the charge was erroneous in three other respects: (1) it gave undue emphasis to the patent issues, (2) it dealt improperly with the licensing arrangements between Pfizer and Bristol, and (3) it gave improper weight to Bristol's pre-conspiracy conduct.

(1) The patent aspects were not unduly emphasized in view of the fact that the case was, as the court now recognizes, circumstantial. The defendants' conduct with respect to the tetracycline patent was among the means and methods of accomplishing the conspiracy listed in the indictment and, like the evidence as to costs and prices, was part of the evidence to be considered with all other factors. The indictment referred to the defendants' restrictive licensing, mutual assistance to obtain a patent, suppression of litigation on the validity of the patent and withholding information from the Patent Office by Pfizer and Cyanamid.[39] Like the price-cost material this complex evidence necessarily required a great deal of time to introduce and, necessarily, it required comprehensive instructions to explain to the jury. Defendants submitted lengthy requests to charge on this aspect of

[39] Ind., ¶ 46(b), (c), (d), (e), (f), (i); 34a–35a.

the case[40] and the district judge received comments on his proposed charge. No defendant asserted that it was unduly long; they simply suggested minor changes and corrections.[41]

(2) The charge respecting the Pfizer-Bristol arrangements for the grant of non-manufacturing tetracycline licenses to Squibb and Upjohn (4988a–4989a; App. D, *infra*, pp. 94a–95a) was correct. Pfizer and Bristol could not lawfully agree that Squibb and Upjohn would not receive manufacturing licenses (*United States* v. *Krasnov*, 143 F. Supp. 184 (E.D. Pa.), affirmed *per curiam*, 355 U.S. 5). The charge made clear that the written agreements between the various alleged conspirators, including the Squibb-Upjohn licenses, were concededly lawful except with reference to other facts.[42]

The Squibb-Upjohn licenses contained no affirmative restrictions; they simply did not confer the right to manufacture and hence left Pfizer's patent a complete bar against the manufacture of tetracycline. This circumstance was made clear to the jury by the instructions explaining a patent monopoly,[43] and the jury was specifically told that it could not infer an antitrust violation from the licenses themselves.[44] The instruction the court would require suggests that for there to be an agreement or understanding Pfizer must have "promised" not to grant manufacturing rights to Squibb and Upjohn (426 F.2d at 45; App.

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[40] 5164a–5167a, 5169a–5172a, 5200a–5202a, 5204a–5216a, 5216a–5222a, 5543a–5549a.

[41] 7330a–7332a, 7339a–7340a, 7341a–7344a.

[42] 4966a, 4982a; App. D, *infra*, pp. 71a, 88a.

[43] 4960a, 4966a; App. D, *infra*, pp. 64a, 70a–71a.

[44] 4966a; App. D, *infra*, p. 71a.

A, *infra*, pp. 27a–28a). Such an element is not required to show agreement under the Sherman Act.

(3) The court of appeals' treatment of Bristol's pre-conspiracy activities is inconsistent with settled principles governing the significance of pre-conspiracy conduct in a conspiracy case. Evidence of acts and circumstances prior to the formation of a conspiracy is admissible for the purpose of establishing motive, intent and methods of operation, and to lay a foundation for showing illegal design. *United States* v. *Houlihan*, 332 F. 2d 8, 14–15 (C.A. 2), certiorari denied, 379 U.S. 828.

Under the instructions, the jury could not have concluded that Bristol was a party to the conspiracy before its December 1955 meetings with Pfizer, as the court of appeals suggests. The trial judge told the jury that "unless a defendant is found guilty upon the charge as he met and defended it, he or it cannot be found guilty at all,"[45] and repeatedly reminded the jury of the government's claim that Bristol joined the conspiracy in December 1955.[46] The government told the jury that until "Schwartz made that deal with McKeen in December 1955, there is nothing about the activities of Bristol that we criticize or say are illegal * * *."[47] Bristol repeatedly emphasized the same point.[48] Bristol's acts prior to its meetings with Pfizer did not become illegal retroactively. But the same acts done after an agreement respecting prices

[45] 4953a; App. D, *infra*, p. 57a.

[46] 4963a, 4971a–4972a, 4982a, 4999a; App. D, *infra*, pp. 68a, 77a, 88a, 107a.

[47] 4967a.

[48] 4721a, 4728a, 4736a, 4739a, 4744a.

or dealings with competing manufacturers could become part of a conspiracy. That was the point of the charge.

CONCLUSION

This case is clearly of great public interest and importance. It involves principles which are of general application in the field of criminal antitrust prosecutions. It is the kind of case which merits full review by this Court.

For the reasons stated the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1971.

APPENDIX A

United States Court of Appeals for the Second Circuit

Nos. 636–38—September Term, 1968

(Argued May 6, 1969—Decided April 16, 1970)

Docket Nos. 32493–95

UNITED STATES OF AMERICA, APPELLEE

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY, APPELLANTS

Before MOORE, FRIENDLY and HAYS, Circuit Judges

MOORE, Circuit Judge.

Chas. Pfizer & Co., Inc. (Pfizer), American Cyanamid Company (Cyanamid) and Bristol-Myers Company (Bristol) appeal from convictions after a jury trial for violations of the Sherman Act (15 U.S.C. §§ 1, 2). The indictment contained three counts, (I) "Combination and Conspiracy in Restraint of Trade"; (II) "Combination and Conspiracy to Monopolize"; and (III) "Monopolization." The defendants were found guilty on all three counts.

Two co-conspirators were named in the indictment Olin Mathieson Chemical Corporation (Squibb) and The Upjohn Company (Upjohn). The chief executive officer of Pfizer, Cyanamid and Bristol respectively

was also named as a defendant. Before trial the indictment was dismissed as to these individual defendants.

The indictment charged a conspiracy by defendants and co-conspirators to restrain trade in the broad spectrum antibiotic drug market. These drugs are enumerated more specifically later. In substance the alleged conspiratorial agreements were that:

(a) The manufacture of tetracycline be confined to Pfizer, Cyanamid and Bristol.

(b) The sale of tetracycline products be confined to Pfizer, Cyanamid, Bristol, Upjohn and Squibb.

(c) The sale of bulk tetracycline be confined to Bristol and bulk tetracycline be sold by Bristol only to Upjohn and Squibb.

(d) The sale of broad spectrum antibiotic products by the defendant companies and the co-conspirator companies be at substantially identical and non-competitive prices.

The government's bill of particulars provides the frame of reference for its claims. As to Pfizer and Cyanamid, the conspiracy to violate antitrust laws began in November 1953 and as to Bristol, Squibb and Upjohn in December 1955 (BP ¶2, 16). The alleged illegal acts were (a) in November 1953 "the illegal cross-license and bulk sales arrangement between Pfizer and Cyanamid which initiated the conspiracy in November 1953" (BP ¶27(a)); (b) Pfizer's confining the tetracycline market to Pfizer and Cyanamid in January 1954; (c) an allegedly illegal agreement in November 1955 whereby Bristol deprived Squibb and Upjohn of their right to manufacture tetracycline; and (d) illegal arrangements between Pfizer and Bristol in December 1955 settling the Bristol-Pfizer patent litigation and depriving Squibb and Upjohn of the right to manufacture tetracycline. Squibb and Upjohn

were named as co-conspirators—not defendants. McKeen (Pfizer), Malcolm (Cyanamid) and Schwartz (Bristol) fixed pricing policies (e). These three individuals authorized the illegal acts (f).

The government's case, except for minor details, was constructed in large measure:

(1) upon the testimony of John E. McKeen, President and Chairman of the Board of Directors of Pfizer, Wilbur G. Malcolm, Vice-President (to September 1, 1957), President (to April 25, 1961), and Chairman of the Board of Cyanamid and Frederic N. Schwartz, President of Bristol (and prior to January 1, 1958, President of Bristol Laboratories).

(2) upon written agreements entered into between some or all of the corporate defendants, many of which agreements related to the disposition of the patent controversies which had arisen *inter sese;*

(3) upon a mass of statistical information relating to production costs, gross profits, prices, etc., of the antibiotics here involved, designed to show that the defendants were reaping unusually high profits from their antibiotic drugs; and

(4) upon some eight days of testimony and exhibits related thereto dealing with the obtaining of the Pfizer tetracycline patent.

These officials testified at length as to the business situations which confronted them during the indictment period and the reasons for the actions taken in the exercise of their judgments to meet each situation as it arose and which called for solution in the light of the facts then confronting them.

Thus the government's case, insofar as actual proof is concerned, rests almost entirely upon oral and written statements from defendants themselves. Because of this circumstance, the facts may be said to be virtually undisputed.

The indictment, as limited by the bill of particulars, constituted the mold which formed the pattern of the government's case, namely, that a conspiracy was formed by Pfizer (McKeen) and Cyanamid (Malcolm) at meetings between them in November 1953 and that Bristol (Schwartz) joined that conspiracy at meetings between McKeen and Schwartz in December 1955. Since the facts as to the happenings of these two series of meetings are critical to the government's case, they must be kept under a spotlight.

It is impossible to condense the trial (the transcript of testimony and exhibits consists of some 12,000 printed pages) except in a highly selective manner, and then only by concentrating on the determinative facts.

The subject matter of the suit was the production and marketing by Pfizer, Cyanamid and Bristol of a broad spectrum antibiotic drug, tetracycline. Prior to 1952 there were three effective drugs in this field. In September 1949 Cyanamid had obtained a patent on aureomycin which it had first marketed in September 1948. In July 1950 Pfizer had secured a patent on terramycin which it introduced on the market in March 1950. Parke, Davis (a pharmaceutical company not involved in this case either as a defendant or as a co-conspirator) in October 1949 had received a patent for chloromycetin which it had put on the market in January 1949.

In 1952 a new drug, tetracycline, was developed. The activities of the three defendants with respect to this drug create the basis of the indictment's charges.

The Pre-November 1953 Situation

Aureomycin (Cyanamid) was produced and sold exclusively by Cyanamid, was covered by patents (Duggar and Niedercorn fermentation process) and was available to the public from December 1948.

Chloromycetin (Parke, Davis patent) was manufactured and sold to the public from 1949.

Terramycin (Pfizer) was produced and sold by Pfizer from 1950 as the sole manufacturer.

No licenses or cross-licenses were granted by any of these companies to each other or to other drug manufacturers.

Each of these drugs was a prescription drug, namely, available only on a doctor's prescription and although some what interchangeable their sales were dependent upon the doctor's views as to their respective effectiveness in the treatment of the particular ailment of the patient. To this extent they were competitive. Each company, taking advantage of its patents and believing in the efficacy of its product but with full knowledge of the similarity in medical usefulness of its competitors' drugs, kept a competitive eye on the prices of the others and refrained from the issuance of licenses. There had been price stability between aureomycin, terramycin and chloromycetin for several years prior to the alleged conspiracy.

Into this somewhat stable situation in the early 1950s came tetracycline, considered by many as superior to the other three.

Tetracycline

Pfizer claimed that in June 1952 one of its scientists, Dr. Conover, had discovered tetracycline which was obtainable by subjecting aureomycin (patent held by Cyanamid) to a dechlorination process. Application was made in October 1952 for a patent on product and process claims. As a result of publicity of the Pfizer discovery, Cyanamid in March 1953 applied for a product and process patent for tetracycline. Thus there were two pending applications for patents for the same drug. To resolve the conflict, the Patent Office declared an interference.

Briefly stated Pfizer believed that it had priority (Dr. Conover—June 1952) over Cyanamid (March 1953), but the outcome was uncertain. However, Pfizer, even were it to win, was completely dependent for production, upon Cyanamid's aureomycin either by purchase or license to manufacture. In an attempt to resolve these business problems, McKeen of Pfizer and Malcolm of Cyanamid met in November 1953. There is no contention by the government that at the time of this meeting and for the years preceding it there was any conspiracy or agreement despite the similarity of the price structure of the three drugs and despite the companies' policies of not licensing others. Prior to October 1951 price reductions by one were met by the others.

The November 1953 Meetings

None of the business practices of Pfizer or Cyanamid which occurred prior to the November 1953 meetings by the government's own specification were a part of the alleged conspiracy in issue here. If there were any, by the government's concession it was created by McKeen and Malcolm at the November 1953 meetings and not before. Two meetings between Pfizer and Cyanamid were held, the first (McKeen and Malcolm) was somewhat preliminary, the second (McKeen, Malcolm, Powers of Pfizer and Martin of Cyanamid) resulted in written agreements (January 11, 1954). The facts as to these meetings were developed by the government through these four witnesses. The subject matter of the negotiations was the tetracycline patent interference situation. If Pfizer won, its victory could have been hollow because Cyanamid controlled the vital aureomycin unless it reached an agreement with Cyanamid to obtain it. Cyanamid with its aureomycin risked being blocked from making tetra-

cycline by Pfizer's Conover patent. To protect the respective interests of both companies, agreements were reached which provided in substance (1) that the parties exchanged proofs as to priority, the Patent Office being the ultimate arbiter and that the party prevailing should give a non-exclusive license to the other in consideration of a certain royalty, and (2) that Cyanamid would license Pfizer also non-exclusively, to make aureomycin for use in producing tetracycline and to supply certain technical information. Another important item underlying the settlement from Pfizer's point of view was the obtaining of an agreement by Cyanamid to sell Pfizer a large initial quantity of bulk tetracycline to enable Pfizer rapidly to get into the market. Thereafter proofs of priority were exchanged and as a result Cyanamid filed a concession of priority in Pfizer's favor in the Patent Office on February 4, 1954.

The government does not claim that these agreements in themselves were unlawful. Although the happenings at these meetings were developed through extensive examination and cross-examination, there was no proof that these meetings involved prices, the fixing of prices, exclusion of competitors or the licensing of others. The only persons present, in addition to reciting the business reasons for the meetings and to describing at length how the then pending patent interference affected their respective companies, specifically stated that the fixing of drug prices, the exclusion of competitors or the licensing or non-licensing of others had not been discussed and that they had left the meetings as entirely free agents with no understandings of any sort on prices or licensing.

Bristol

Bristol, mindful of Pfizer's and Cyanamid's activities in the tetracycline field, filed in October 1953 its patent application. Although this application was rejected, it filed a separate patentability claim for tetracycline hydrochloride. This claim brought about in March 1954 an interference involving Bristol, Pfizer and Cyanamid. Despite Cyanamid's patent position, Bristol proceeded to manufacture tetracycline by a fermentation process.

Bristol, having learned in February 1954, of the Pfizer-Cyanamid concession of priority whereby it appeared most likely that Pfizer would receive a patent and concerned over a trade paper report that Pfizer would not license any other company than Cyanamid, thus potentially excluding all other competitors, communicated with Pfizer. Pfizer reaffirmed its policy not to license anyone and its intention to bring suit against manufacturers or sellers or tetracycline if in a legal position to do so. Nevertheless, Bristol in mid-1954 agreed to sell to Squibb and Upjohn bulk tetracycline, Bristol being indemnified by them against damages resulting from any infringement suit. Thus, Bristol was subjected to potential patent infringement liability.

The Issuance of the Patent—January 11, 1955

On January 11, 1955 Pfizer received its tetracycline patent and on the same day filed infringement suits against Bristol, Squibb and Upjohn. Bristol with its two essential customers, Upjohn and Squibb, at stake was most anxious to settle the patent litigation, particularly since there were some negotiations for a two-party settlement between Pfizer and Upjohn. To forestall this possibility, agreements were entered into between Bristol and Upjohn and Bristol and Squibb

(November 1955) whereby Bristol assumed control of the patent litigation, Bristol became the indemnitor, no independent settlements with Pfizer were to be made and, if Brisol settled with Pfizer, licenses limited to purchase, use and sale of tetracycline were to be obtained for Squibb and Upjohn.

The Broady Incident

Prior to December 1955 Pfizer had taken an adamant position in refusing to license Bristol. Quite unrelated to tetracycline, the trial of John G. Broady, a lawyer-investigator, had just (November-December 1955) taken place in the New York courts. Broady had been convicted of tapping telephone wires amongst which were those of Bristol and Squibb. Broady apparently had been retained by Pfizer's general counsel. Bristol threatened to use this newly discovered material in the patent litigation. Pfizer was fearful of the adverse publicity if the incident were disclosed. The Broady incident brought about a radical change in Pfizer's attitude and a meeting was quickly arranged between McKeen (Pfizer) and Schwartz (Bristol) to discuss settlement.

The December 14th and 15th, 1955 Meetings

The Broady incident gave to Bristol a trump card which it had not hitherto possessed and Bristol played it boldly. Since the events of these meetings bring Bristol for the first time into the conspiracy, according to the government, they must be examined with care. There were only two principal participants at these meetings, Schwartz (Bristol) and McKeen (Pfizer) and their patent counsel. No evidence of price-fixing, exclusion of competitors, restriction on licenses or the exercise of monopoly power was adduced by the government in its development of what occurred at these meetings. Both McKeen and

Schwartz testified concerning the situation facing both companies as a result of the patent litigation and Schwartz added his indignation over the Broady incident. Agreement, however, was reached and a letter of intent signed (GX 95) which was followed by an agreement executed on March 25, 1956 (GX 50). Bristol requested and received for Squibb and Upjohn licenses to purchase, use and sell (GX 51, 52).

Briefly reviewing the situation up to December 15, 1955, Bristol's policy of setting its prices at the same level as Pfizer, Cyanamid and Parke, Davis, its agreements with Squibb and Upjohn, and its limitation to two bulk customers was concededly legal and not pursuant to any conspiracy.

The government does not claim that the agreement of December 14–15, 1955 was illegal *per se;* in fact it concedes the contrary (BP 7). It further admits that Bristol's actions prior thereto were not illegal. It does stress the absence in the licenses granted of the right to manufacture but in its bill of particulars concedes that Upjohn never sought this right through its bargaining agent Bristol.

Bristol's Post-December 1955 Activities

There was no change in Bristol's practices after the December 1955 meetings. Prices remained as stable as in the years preceding the alleged conspiracy. Bristol reduced its costs drastically in 1954 but made no selling price reduction. As a result of developing a sales force and enabling Squibb and Upjohn to market tetracycline products, Bristol's percentage of the market increased substantially with a consequent diminution of Pfizer's and Cyanamid's shares.

The Trial

The stage had been set in the indictment and bill of particulars for a trial upon the issue of conspira-

torial agreements reached at specific times (November 1953 and December 1955) between specific persons (McKeen-Malcolm; McKeen-Schwartz). The bill of particulars alleged that:

> 27. (a) McKeen and Malcolm personally negotiated the illegal cross-license and bulk sales arrangement between Pfizer and Cyanamid which initiated the conspiracy in November 1953.
>
> • • • • •
>
> (d) McKeen and Schwartz personally negotiated the illegal arrangements in December 1955 which resulted in Squibb and Upjohn being deprived of any right to manufacture tetracycline, in their being required to purchase all tetracycline requirements from Bristol and also resulted in settlement of all litigation with Pfizer involving the validity of the Pfizer tetracycline patent.
>
> (e) McKeen is the person who has been responsible for Pfizer's pricing policy on broad-spectrum antibiotics; Malcolm is the person who has been responsible for Cyanamid's pricing policy on broad-spectrum antibiotics; Schwartz is the person who has been responsible for Bristol's pricing policy on broad-spectrum antibiotics.

Before the openings by counsel, the trial court by way of preliminary instructions had stated to the jury that the conspiracy included "the creation of uniform, non-competitive and unreasonably high prices to the users of broad spectrum antibiotics." In its opening the government had stressed "enormous" profits by comparing factory cost and selling price and gave as an illustration of Cyanamid's 1954 cost a figure of $2.55 production cost for 100 capsules, a 1956 cost of $1.76 and a 1958 cost of $1.59 against a selling price to the druggist of $30.60 and $51 to the consumer.

The government conceded that production cost did "not include such items as research, promotion, advertising, executive overhead and things like that" but asked the jury to consider the significance of low production cost in relation to selling prices. The jury was also told that even in the pre-conspiracy, pre-tetracycline days there were "unreasonably high profits involved."

At the conclusion of the government's opening defendants moved for a mistrial because of its allegedly misleading prejudicial and inflammatory statements as to unreasonably high prices and profits. The motion was denied.

During the early weeks of trial, the government proceeded to offer a vast amount of testimony and scores of exhibits relating to factory production costs and alleged profits. To all of this proof defendants made objections which were overruled and at the end of the government's case they moved to strike all evidence relating to prices and profits during the conspiratorial period (November 1953–September 1961) and during the period prior to 1953 when the conspiracy was conceded not in existence. The motion was denied.

The Government's Summation as to Profits

The government devoted much of its summation to the profits obtained by the respective defendants from their particular drugs (illustrative: "in those seven years Bristol made approximately $57 million in profits"—$69 million, production cost $12 million). "In 1954 it cost Cyanamid $2.26, in 1955 it cost them $1.57. That listed for $51. The druggist paid $30.60—2,000% mark-up. * * * I think it is a fair inference from this chart that Cyanamid and Pfizer and Bristol starting in 1956 were making an unreasonably high profit."

I.

Amongst other grounds defendants seek reversal because they claim that the court in its submission of the issues to the jury departed radically from the indictment's allegations and the bill of particulars as to the formation of the conspiracy. This point is based upon the specification in the bill of particulars that the conspiracy came into existence in November 1953 and December 1955 and that it was the result of meetings between specific individuals. Defendants claim that they rested (except for recalling one witness) at the close of the government's case, expecting the case to go to the jury on that theory. They assert that the court, instead of charging the jury that the conspiracy as alleged must be found within the scope of the indictment and bill of particulars, in fact charged the opposite in instructing that the central requirement of an agreement "does not mean, however, that in order to create an unlawful combination or a conspiracy, the parties must meet together at some time or place or, indeed, that they must meet together at all"; "that proof of a conspiracy does not necessarily require proof of express agreements or proof that the alleged conspirators had any face-to-face meetings at all"; and despite the government's introduction of the written agreements that "This is rarely the way in which criminal conspiracies are formed."

Had the government relied on a general course of conduct throughout the years, these instructions might well have been apposite. But this was not such a case. The vast amount of time taken by the government in stressing high prices and profits and alleged patent frauds, together with the court's charge deprecating the testimony of defendants' officers, may well have succeeded in diverting the jury from the real issues as framed by the indictment and bill of particulars.

Defendants contend that the charge as given cut the government loose from the theory on which it had tried the case and allowed the jury to convict on the basis of conduct during the indictment period without making the essential decision as to whether agreements were actually made at the meetings.

Instead of charging that the government had relied (Bill of Particulars) on specific dates and specified individuals, the court charged that:

> "While the prosecution alleges approximate dates for the commencement of the conspiracy, and charges that the conspiracy continued up to the date of the indictment in August 1961, it is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges. If you find all the other elements established, it would be sufficient for Counts 1 and 2 if you found that the conspiracy existed and was continued for any substantial portion of the five-year period ending at August 17, 1961."

Along the same lines were the instructions that:

> This central requirement of an "agreement" does not mean, however, that in order to create an unlawful combination or a conspiracy, the parties must meet together at some time and place or, indeed, that they must meet together at all. Nor does it mean that their undertaking must be embodied in express or formal contractual statements, or express words of any kind.
>
> * * * * *
>
> Because express agreements are neither necessary nor common in establishing unlawful conspiracies the crime is one which may be shown from circumstantial evidence as to a course of conduct or business dealings. In other words, whether the prosecution has sustained its burden of proving a conspiracy must fre-

quently be judged by what the jury finds the parties actually did rather than from the words they used.

* * * * *

Along with all the other evidence in the case, you have heard the sworn testimony of the principal officers of the three defendant companies, and you have heard each of them deny in broad terms that there was any understanding or agreement among them, either express or implied, that there would be uniform and identical prices, or that there would be any exclusion of competitors, or that they would seek together in any way to achieve monopoly power. You must, obviously, give due and deliberate thought to this testimony, and ultimately attribute to it such weight as it permits in your impartial judgment. In performing this task, you will have in mind the definition of a combination or conspiracy as it has been given to you in these instructions, recalling, among other things, that the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter.

To this charge defendants took exception, saying: "We tried the entire case pivoting around those[1] dates and I think it would be a variance against the indictment and the bill of particulars and the contentions of counsel in the opening to leave it in the jury's mind, any doubt if they decide Bristol joined later." Cyanamid and Pfizer joined in the exception to the charge that "it was not essential and not necessary that the precise dates be established."

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[1] November 1953; December 1955: 5011a, 5012a.

Defendants had asked the court to instruct the jury that "The defendants, under the law, were entitled to rely on the Government's bill of particulars, taken together with the indictment, as a fair statement of what the issues in this case are about, and what they are not about." And that "You must evaluate the evidence in the light of the charges made in both the indictment and the bill of particulars. You cannot find any defendant guilty on the basis of some charge not made in the indictment as supplemented by the bill of particulars, nor may you convict on a basis which is different or contrary to the specific charges in the indictment as supplemented by the bill of particulars." (Cyanamid Suppl. Reg. No. 2)

The request was denied.

The government had as part of its direct case called as its witnesses the only key officers of defendants present at the face-to-face critical meetings in November 1953 and December 1955. In their long cross-examination of their own officers, defendants had focused on refuting what the government claimed had happened at the meetings, and then rested on the assumption that the meetings would be treated as an important part of the case. Although in its charge the court spent much time discussing the circumstantial evidence, it slighted and rather deprecated the testimony about the meetings which was vital to any jury decision as to the existence of a conspiracy.

The suggestion by the court that the jury should not reject the testimony of defendants' officers was followed by what might well have been regarded as a skeptical view as to their "assertions of innocence." But the officers had gone far beyond "assertions of innocence." They had testified at length concerning the business problems created by the tetracycline patent situation, how it affected their respective companies

and how settlements instead of long-drawn-out and costly litigations appeared to be the wiser course. Furthermore, the officers' "assertions of innocence" included specific statements that particular subjects had not been discussed and that they had left the meetings as entirely free agents with no understandings of any sort on prices or licensing. To allow the jury to convict without finding that these denials were untrue would free the government from its basic theory of the case and allow it to rely on any understanding that might be inferred from other conduct. When the judge instructed that "assertions of innocence by such officers may reflect partly legal as well as factual contentions," meaning that the officers might be using "agreement" in an overly narrow sense, he was disregarding testimony that no understanding of *any* sort was formed at the meetings, and probably did confuse the jury about what parts of the testimony bore factually on whether a conspiracy had been formed. Thus, in effect, the charge nullified the testimony of defendants' officers as to the business reasons for the intercompany agreements and permitted the jury to infer a conspiracy from afterevents, which were relevant only insofar as they tended to show that an agreement was reached *at the meetings*. The charge not only did not focus the jury's attention on this but may well have led to a contrary view on their part.

A review of the entire charge leaves the definite impression that although the circumstantial evidence and "unreasonably high profits" aspects of the case were stressed, the key issue as to the formation of the conspiracy as particularized by the government was not given proper attention and the importance of establishing a conspiracy as charged so minimized that there can be no assurance that the jury was not misled to defendants' serious prejudice.

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More specifically, one-third of the charge was devoted to such necessary generalities as reasonable doubt, circumstantial evidence, the indictment and the applicable law. Possible fraud on the Patent Office consumed one-quarter and the claim of unreasonably high prices one-sixth. Thus three-quarters of the charge did not relate to the key issue, namely, the formation of the conspiracy as specified in the bill of particulars. Except for mentioning the November 1953 and December 1955 dates, there was nothing in the charge which focused the jury's attention on the primary issue which they were to resolve, namely, did the participants at those meetings conspire to carry out the program as alleged by the government?

In contrast to concentrating on the conspiracy as alleged, the government in its summation and the court in its charge virtually ignored the allegedly conspiratorial meetings. Instead, the patent situation and high prices were stressed.

With respect to the Patent Office proceedings, the case for this purpose was virtually diverted from an antitrust conspiracy case to a patent fraud case.

The government's theory of fraud on the Patent Office, in brief, is based upon the question of the presence of tetracycline in aureomycin. The Patent Examiner had expressed the view that if any identifiable amount of tetracycline were present in aureomycin, a patent would not have been issued to Pfizer. The government claims that to enable Pfizer to obtain the patent, Cyanamid falsely represented to the Examiner that tetracycline was not present and that Pfizer was aware of this collaboration.

The jury were instructed as to the duty of applicants to disclose prior art and other facts material to the allowance of a patent and as to the withholding of information with intent to deceive. They were

asked to resolve the dispute as to "what information was, in fact, of interest to the Examiner and whether the answers to his questions were deliberately unresponsive and misleading." The procedure in the Patent Office was outlined, the scope of patent claims, the way a Patent Examiner proceeded to determine the claims to which an applicant might be entitled, the further steps an applicant might take after rejection, namely, reconsideration or amendment and an appeal after final rejection to the Board of Appeals. All were explained. The evidence before the Patent Examiner was described in detail, including his speculations that the patentees, Duggar and Niedercorn, might have had co-production of tetracycline with aureomycin without recognizing it. As previously stated a quarter of the lengthy charge was devoted to the patent aspects, but nowhere was the jury told in clear language that the Patent Office proceedings were relevant only insofar as the acts of Pfizer and Cyanamid supported an inference that at the November 1953 meetings they had entered into agreements to fix prices or to exclude others.

Towards the end of the charge, ten pages were expended on the relation of allegedly unreasonably high prices. The court charged that "* * * uniform prices, maintained at a constant level over long periods of time—if such prices are artificial and unrelated to supply and demand or to other variations or changes in the pertinent economic factors—may be considered by you as some evidence from which an agreement or understanding or concerted action to restrain trade may be inferred."

The court read to the jury the last three of the "means and methods" charged in the indictment, namely:

1. Pfizer and Cyanamid maintained substantially identical and unreasonably high prices on Terramycin products and Aureomycin products, respectively.

2. Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its tetracycline products on the market at prices which were substantially identical with each other and which conformed to the prices of Terramycin products and Aureomycin products in effect as of November 1953, and all these companies maintained such substantially identical and unreasonably high prices until at least July 1960.

3. Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its tetracycline products on the market in dosage forms and customer classifications substantially identical with the Terramycin products and Aureomycin product dosage forms and customer classifications in effect as of November 1953, and have continued to use such substantially identical dosage forms and classifications to date.

Referring to the government's contention "that broad spectrum antibiotic sales comprised a major portion of the business, and a major source of the profits, of the defendant companies in varying proportions," the court charged that these assertions "may be considered as part of the general background and setting in which the events of the case transpired." The court told the jury that they could ask themselves "whether price cuts or price changes of any kind would seem to have been indicated or desirable for any of the companies involved from the viewpoint of their self-interest." The court instructed that "neither the Sherman Act nor any other law that concerns us in this case imposes any limit on the price a company may charge for its commodity" and that the jury should not be influenced "by any notion that drug

prices were too high or too low or even just right" and explained its reason for allowing cost and profit data in evidence because thereby the government sought to establish (presumably by inference a conclusion of conspiracy) stability of prices over a long period of time despite a disparity of production costs and market shares amongst the defendants.

Defendants take particular exception to two portions of the charge relating to profits and costs. They say as to profits that the charge that "Unreasonably or extraordinarily high prices or profits charged uniformly by competing sellers over a substantial period of time may be evidence, taken with all the other circumstances of the case, supporting an inference that the parties had an agreement rather than a competitive situation with respect to prices," and was not justified and could well have misled the jury.

As to costs the court charged:

> There has been evidence of so-called "production costs" or "factory" or "standard" costs from records kept by the companies, and comparisons in these records between such costs and selling prices. Many of these records omit many factors that should be included in costs in order to compute net profits. Such factors, without exhausting them, were research, promotion expenses, and other kinds of costs. You should have these omissions in mind and take them into account when you consider the figures I have just mentioned.

This instruction, defendants argue, permitted the jury, without the benefit of any proof of the "many factors that should be included in costs in order to compute net profits" or the factors which defendants have represented as constituting 90% of true cost, to speculate as to what proper costs would have been. The absence of the factors, which the court stated

had been omitted, namely, "research, promotion expenses, and other kinds of costs," gave to the jury they say, without any proof of what the omissions might have been, uncontrolled discretion to keep "these omissions in mind and take them into account when you consider the figures." Defendants contend that with 90% of the material essential to an accurate determination of costs withheld from the jury by exclusion, it was being instructed "to reach its verdict on its own crude lay notions and subjective impressions as to whether prices and profits were 'unusual,' 'artificial,' 'extraordinary' or 'unreasonably high.'"

The jury thus entered upon its deliberations with its attention diverted from the real issues to patent fraud and unreasonably high prices—both inflammatory issues. Quite apart from their relevance, these so-called means and methods could well have so prejudiced the jury that it either failed to resolve the primary issue or subordinated it to the issues stressed. Because of this real possibility, defendants Pfizer, Bristol and Cyanamid are entitled to a new trial.

II

Defendants also seek reversal because the court, after receiving evidence of the marketing practices and policies of Parke, Davis (not a defendant) which was concededly not engaged in the alleged conspiracy, improperly placed restrictions on them by refusing to permit them to argue to the jury the effect of this evidence upon their innocence or guilt. In addition, these defendants claim reversible error in the charge actually given with respect to Parke, Davis' role in the antibiotics field.

Although the court said that "I will allow everybody to risk arguments in summation based on comparisons between the defendants and Parke, Davis," it ruled

that "I will sustain objections to arguments based on the legal notion of the presumption of innocence which I think has no place in that discussion and I think it would be an incorrect legal approach to the subject. * * * because I don't think you should be asking the jury to draw any inferences from the presumption of innocence relating to a party which is not on trial." The ruling was broadened by the court's excluding reference to "a presumption that business is conducted lawfully."

Parke, Davis during the critical years of the alleged conspiracy manufactured and sold the antibiotic, chloromycetin. It was the second largest in the antibiotic field, accounting for some 24% of all sales. In the years preceding the alleged conspiracy, its prices paralleled those of the other companies. It had never licensed others under its patent and had never made bulk sales. The government not only conceded but affirmatively stated "on the record" that Parke, Davis was not a conspirator. Naturally defendants sought to capitalize on the fact that Parke, Davis, as a non-conspirator, engaged in the same marketing practices which the government charged created a beyond-reasonable-doubt inference of conspiracy on their part.

The court instructed the jury that "Parke, Davis is not alleged to have been a member of the conspiracy charged by the government" and that they could take into account Parke, Davis and its activities insofar as they were material factors but then said:

> However, the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direction as a fact in itself. There is no profit here in speculating as to why Parke, Davis was not indicted. Parke, Davis is not on trial here, and the verdict concerning the defendants which are on

trial must be based in the end on the law and the evidence relating to them as they have been presented to you in this courtroom.

The evidence as to Parke, Davis' conduct was all-important to the defendants. The government had introduced at length proof as to Parke, Davis' practices and policies during the period preceding, and included in, the indictment. A stipulation of facts stipulated that Parke, Davis had a patent on its antibiotic, chloromycetin; that "Prior to August 17, 1961, Parke, Davis did not grant any licenses under its Chloramphenicol (chloromycetin) patent"; that "Parke, Davis made no bulk sales of Chloromycetin." Similarity of price structure intentionally adopted for business reasons was also established.

The charge as given could well have had the effect of stressing the failure to indict, thus carrying the connotation that Parke, Davis might have been guilty but was not indicted for undisclosed reasons. Furthermore, in limiting the jury's consideration to the "Evidence relating to them [defendants] * * *," the court lessened, or might have foreclosed the giving of, any weight which the jury might have attributed to the evidence of Parke, Davis' conduct.

Exception was taken, counsel saying:

> * * * we believe that the juxtaposition of these two charges has the effect of informing the jury that they are not to consider the fact that Parke, Davis followed parallel conduct in many aspects of the marketing of an interchangeable drug as a basis for an inference that such conduct was innocent.

Cyanamid had endeavored to bring the similarity of Parke, Davis' non-conspiratorial business activities before the jury in its request that the jury be instructed:

You have heard counsel from time to time throughout the trial refer to what Parke, Davis did and did not do, and there has been evidence admitted as to Parke, Davis' actions, including the testimony of Mr. Loynd its former chief executive officer and facts as to Parke, Davis which were stipulated between the Government and defendants. Although Parke, Davis was neither indicted nor claimed to have been a co-conspirator in this case, evidence of its actions and its relative size in the broad spectrum antibiotics market is relevant and should be considered during your deliberations.

The evidence is undisputed that Parke, Davis had a patent on its broad spectrum antibiotic product, Chloromycetin, and that during the period covered by the indictment it granted no licenses under that patent and it did not sell Chloromycetin in bulk. It is an undisputed fact that during the period 1954–1961, Parke, Davis' sales of Chloromycetin accounted for 23.8% of sales in the broad spectrum antibiotics market alleged in the indictment, and Parke, Davis was the second largest seller in that market during that time. There is also evidence that Parke, Davis during most of the period covered by the indictment had substantially the same prices on its Chloromycetin products as defendants had on comparable dosage forms and package sizes of the broad spectrum products which they sold.

You are entitled to consider the extent to which the evidence may show that Parke, Davis engaged in conduct which the Government claims proves conspiracy, and the further fact that no one claims that this conduct by Parke, Davis was pursuant to the conspiracy claimed by the Government.

Had defendants been allowed to argue without restriction the full effect of the Parke, Davis marketing policies and procedures, defendants could have

stressed that Parke, Davis quite independently of any conspiracy had paralleled defendants in its pricing and licensing practices both before and after the commencement of the alleged November 1953 conspiracy. The interest of the jury in Parke, Davis was evidenced by requests during their deliberations on two occasions for Parke, Davis evidence.

The restrictions placed upon defendants with respect to the Parke, Davis proof and the failure to present to the jury the substance of defendants' requests to charge constitute sufficient prejudice as to require a new trial.

III.

The Licenses to Squibb and Upjohn

The government placed great importance in support of its conspiracy-to-exclude argument upon the transactions between Bristol, Squibb and Upjohn in November 1955 and the Bristol-Pfizer agreements in December 1955. The conclusions, implications and inferences which the jury might draw from these agreements, of necessity were guided, and controlled by the court's instructions as to the legal effect of the agreements. Depending upon the court's construction of the consequences of the agreements, the jury would enter upon its deliberations as to whether they supported, or were indicative of, the indictment charges.

The situation in November 1955 vis-a-vis Bristol, Upjohn, Squibb and Pfizer was (1) outstanding contracts for the sale of bulk tetracycline by Bristol to Squibb and Upjohn; (2) an infringement suit by Pfizer against Bristol, Squibb and Upjohn; (3) extreme concern by Upjohn over its potential liability to Pfizer, which concern caused Upjohn to explore with Pfizer the possibility of a separate settlement; (4) Bristol's efforts to avoid a separate settlement;

and (5) Bristol's consummation of the bulk sales agreements with Upjohn and Squibb.

These agreements (November 3rd and 18th) with Upjohn and Squibb respectively looked towards a hoped-for settlement between Bristol and Pfizer and in anticipation provided for a license in any such settlement from Pfizer to Upjohn (and to Squibb) which license "may, however, be limited to your right to purchase, use and sell tetracycline to the drug trade."

However, the propriety of these contractual arrangements is not questioned by the government as to Bristol. Thus in its summation the government said: "until the time they made that deal—Schwartz made that deal with McKeen in December 1955, there is nothing about the activities of Bristol that we criticize or say are illegal."

The pre-December 1955 transactions, however, were by no means excised from the case because the government proceeded to argue that the "restrictive arrangement" in the November 3, 1955 agreement had a sinister connotation, and was a part of Bristol's scheme to hold Upjohn and Squibb more securely as purchasers of its bulk tetracycline. The government even brought Pfizer into the picture by imputing that the licenses to sell and use was a Bristol-Pfizer plan to restrict Upjohn and Squibb.

Instead of instructing the jury that the concededely legal November 1955 Bristol-Upjohn-Squibb agreements could not be considered a part of any conspiracy, or, charging, as requested by Bristol that:

> The fact that Pfizer agreed to Bristol's request that Pfizer give to Upjohn a license to purchase, compound, use and sell tetracycline, does not amount to an agreement or understanding by Pfizer with Bristol under which

Pfizer promised not to grant manufacturing rights to Upjohn. Bristol's Request No. 32A. the court not only failed to give such instructions but by its actual charge gave its own, and in our opinion incorrect, interpretation of the agreements.

After referring to the government's contention that there was a restriction forbidding manufacture by Squibb and Upjohn, the court charged that "The critical inquiry on this score is whether the limitation on Squibb and Upjohn, which barred them from manufacturing, was the particular objective of Bristol and was an agreed objective between Bristol and Pfizer in the issuance of that license."

The agreements, however, disclose that there was nothing therein which barred them [Upjohn and Squibb] from manufacturing or which forbid manufacture. In fact there were no restrictive phrases whatsoever. Bristol undertook affirmatively *if* the patent litigation were settled "(2) to secure for you [Upjohn] a direct license under said patent which *may*, however, be limited to your right to purchase, use or sell tetracycline. * * *" (GX 108) (emphasis supplied). The possibility of securing a license to "purchase, use and sell" is a far cry from an undertaking forced upon Upjohn and Squibb by Bristol and Pfizer which forbade and barred manufacture. Any bar, which there might have been, would have been the natural legal consequence of Pfizer's patent. All that the licenses accomplished was to lessen the patent restrictions. The court, having incorrectly assumed that this bar existed, submitted to the jury the question of "whether the limitation on Squibb and Upjohn, which barred them from manufacturing * * * was an agreed objective between Bristol and Pfizer in the issuance of that license." The jury, in being so advised, might well have concluded that the

December 1955 Bristol-Pfizer agreement was, in fact, a bar which violated the antitrust laws and that Bristol and Pfizer had collaborated in imposing restrictions which otherwise did not exist.

Furthermore, the term "restriction" was used alternately to characterize the licenses and to describe what Pfizer and Bristol were forbidden to agree on. The net result was that the charge might be read to contain this syllogism: Pfizer and Bristol were forbidden to agree to restrict licenses to others; the licenses given imposed restrictions on Squibb and Upjohn; Pfizer and Bristol agreed on those licenses; therefore, Pfizer and Bristol did what they were forbidden to do. But there was nothing illegal in Bristol's November 1955 undertaking to try to obtain from Pfizer purchase, use and sell licenses for its customers, Upjohn and Squibb. When Bristol and Pfizer met a few weeks later and concluded their settlement, Bristol's contractual obligation was to secure for Upjohn and Squibb the licenses to which the parties had agreed, namely, purchase, use and sell. It was scarcely Pfizer's duty to insist upon Bristol broadening the type of license requested. Except for the abortive independent attempt on Upjohn's part to explore settlement possibilities directly with Pfizer, there was no proof that the right to manufacture was asserted as a prerequisite condition in connection with either the November 1953 or the December 1955 agreements.

And finally, Squibb and Upjohn did not need licenses as a matter of law to sell tetracycline which they purchased from Bristol, a licensed manufacturer.

IV.

Bristol's participation in the tetracycline race is highly significant. It can be construed, as Bristol

would have it, as evidence of a very competitive situation, with Bristol determined to assert a position in the field, or upon the government's theory, as proof of acts from which an inference of conspiracy with Pfizer and Cyanamid can be drawn.

The indictment had charged that the "combination and conspiracy was effectuated by various means and methods including, but not limited to, the following:" Twelve subsections are set forth. Those referring to Bristol are:

"(a) Cyanamid licensed Pfizer and Bristol to use its Aureomycin patent in the manufacture of Tetracycline and refused to license all other applicants."

"(b) Pfizer licensed Cyanamid and Bristol under its Tetracycline patent and refused to license all other applicants."

"(d) Pfizer, Cyanamid and Bristol suppressed litigation involving the validity of Pfizer's Tetracycline patent."

"(e) Pfizer and Cyanamid and Bristol.* withheld pertinent and material information from the Patent Office and otherwise misled the Patent Office prior to the issuance of Pfizer's Tetracycline patent.

"(g) Bristol sold bulk Tetracycline only to Upjohn and Squibb. * * *"

"(h) *Bristol entered* into agreements with Upjohn and Squibb respectively which required Upjohn and Squibb to purchase all their requirements of bulk Tetracycline from Bristol."

"(k, l) Pfizer, Cyanamid, Bristol, Upjohn and Squibb introduced their Tetracycline products on the market at substantially identical prices and all maintained such prices until at least July 1960."

The government offered proof in support of these means and methods. All, however, preceded the date

*Charges withdrawn as to Bristol.

upon which Bristol is alleged to have entered the conspiracy. Specifically, the Cyanamid license was received in January 1955, Bristol's bulk sales to only Squibb and Upjohn commenced in September 1954, the requirement contracts were in November 1955, and marketing at substantially identical prices started as early as May 1954.

Although the efficacy of instructions limiting this evidence against Bristol at the time of receipt is questionable, its harmful effect upon Bristol could only have been minimized by the clearest instructions that the jury should not consider Bristol's part in any of the events prior to December 14–15, 1955 as proof of Bristol's being in any conspiracy. Failure so to charge plus the affirmative charge that "it is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges," could well have caused the jury to believe that Bristol was involved in a conspiracy long before December 14–15, 1955. A comprehensive charge as to these prior events became all the more important because the government, in effect, had put its stamp of legality on identity of price and restricted bulk sales. It was thus incumbent upon the government to prove beyond a reasonable doubt by some reverse alchemistic process that acts which had been legal had by some action taken at the December 14–15 meetings been changed merely by continuance into acts thereafter illegal.

There was no direct proof of conspiracy to be found in the Schwartz-McKeen versions as developed extensively on direct and cross-examination relating to the December 14–15, 1955 meetings. Nothing illegal is to be found in the written agreements embodying the understandings reached. But, in a case so wholly dependent for conviction upon the jury's drawing of

inferences in direct contrast to the statements of the witnesses present and the documents evidencing their agreement, the importance of instructions cannot be overemphasized. An appellate court has no means of knowing what factors were decisive in the jury's collective mind in reaching their verdict. However, here we can say that failure to differentiate between the legal and the illegal was prejudicial error.

In conclusion, the government elected to make specific charges of agreements made at specific times between specific individuals which agreements, it alleged, constituted the conspiracy to do the illegal acts charged in the indictment and bill of particulars. The case, as tried, covered practically every phase of the development and marketing of the four so-called wonder drugs, aureomycin, chloromycetin, terramycin and tetracycline over a period of more than ten years.

Probably, of necessity, the government virtually had to ignore or at least play down the business reasons asserted by the defendants' executives as motivating their agreements and the actions taken by them and to concentrate on the possibly more jury appealing aspects such as abnormally high prices and profits and patent fraud. It was from such proof that the jury was asked to infer conspiratorial agreements which the government had not established through the principals at the November 1953 or the December 1955 meetings or through the written agreements themselves except as read in connection with other facts.

Under these circumstances it was highly important that the jury's attention be directed in the charge to the primary issue framed by the government. But as the case was submitted to the jury, this issue was subordinated in government summation and charge to the more inflammatory issues of illegally exorbitant prices

charged to a victimized public and patent fraud. But the conspiratorial agreements, as charged, did not emanate from these issues.

A review of the entire record leads to the conclusion that the judgments of conviction against Cyanamid, Pfizer and Bristol must be reversed and that a new trial be had as to them.

HAYS, Circuit Judge (dissenting).

I respectfully dissent.

1. *General*

"On appeal from the convictions the evidence is to be viewed in the light most favorable to the government and all permissible inferences are to be drawn in its favor. United States v. Kahaner, 317 F.2d 459, 467 (2d Cir.), cert. denied, 375 U.S. 836, 84 S.Ct. 74, 11 L.Ed.2d 65 (1963); United States v. Hall, 346 F.2d 875 (2d Cir.), cert. denied, 382 U.S. 910, 86 S.Ct. 250, 15 L.Ed.2d 161 (1965); United States v. Marchisio, 344 F.2d 653 (2d Cir. 1965)." United States v. Jones, 374 F.2d 414, 419 n. 2 (2d Cir.), cert. denied, 389 U.S. 835, 88 S.Ct. 40, 19 L.Ed.2d (1967). Although the evidence against appellants is not overwhelming, viewed in the perspective of our limited scope of review it is sufficient.

The indictment charged defendants, in three counts, with having combined and conspired in restraint of trade in the broad spectrum antibiotic market, with having combined and conspired to monopolize that market, and with having illegally monopolized it. It was alleged that defendants conspired to exclude competitors and to fix prices and that, having sufficient market power to do so, defendants succeeded in accomplishing the objects of their conspiracy.

The government's evidence establishes that the price of tetracycline, a broad spectrum antiobiotic controlled

by defendants and having a very large sale, did not change at all from 1953 until 1960. Throughout that whole period each defendant charged exactly the same amount although Pfizer and Cyanamid were consistently producing tetracycline at a cost substantially lower than the production costs of Brisol, Squibb and Upjohn. Pfizer and Cyanamid allowed themselves to lose significant portions of their market to the higher cost producers without ever attempting to regain those portions by cutting prices. Although the production costs of all producers markedly decreased, the resulting savings were not reflected by any price reductions.

The agreement to exclude competitors centers on the 1953 patent settlement between Pfizer and Cyanamid. Pfizer licensed Cyanamid to produce and sell tetracycline while Cyanamid licensed Pfizer to manufacture, though not to sell, aureomycin. Neither Pfizer nor Cyanamid, then, with Parke-Davis, the only producers of broad spectrum antibiotics, had previously licensed any other drug companies to produce or sell their respective broad spectrum antibiotics. The government presented evidence from which the jury could infer an agreement between Pfizer and Cyanamid that Pfizer would not license anyone other than Cyanamid to manufacture tetracycline. Shortly after their meeting at which the parties had the opportunity to discuss such an agreement Pfizer publicly announced that the company policy was not to issue any licenses for tetracycline. That policy was strongly impressed upon Bristol, Squibb and Upjohn, and almost certainly would have resulted in litigation had the Broady wiretap incident not intervened. The point at which the understanding between the parties merged into an agreement is, perhaps, difficult to define with precision, but this constitutes no

reason for denying to the jury the power to conclude that such an agreement existed.

2. The Issues of Patent Fraud and Unreasonably High Prices

The court's instructions on the issues of patent fraud and unreasonably high prices were entirely proper. The evidence introduced on these issues tended to support the charge of conspiracy.

The government did not contend that Pfizer and Cyanamid agreed to defraud the patent office, but only that their conduct was evidence of the underlying conspiracy to exclude competitors. The jury would have been justified in finding that Pfizer's statement to the patent office that the processes of the prior art produced no tetracycline was deliberately false and that it was made in the expectation that Cyanamid would not challenge the statement. Cyanamid's participation in such a course of conduct is readily explainable by its expectation that it would be Pfizer's sole licensee.

The evidence relating to the high price level for broad spectrum antibiotics was equally relevant to the issue of conspiracy. There was evidence that the price for the antibiotics remained the same notwithstanding differences in costs among the defendants, notwithstanding overall decreases in costs through the period of the conspiracy, and notwithstanding changes in the market percentages controlled by each defendant. The jury would be justified in finding that the failure of any defendant at any time over a period of seven years to lower these extremely high prices evidenced a conspiracy. Defendants attempted to convince the jury that the oligopolistic nature of the broad spectrum antibiotics market made the ordinary

concept of a competitive market irrelevant. The jury was not compelled to accept defendants' representations, and we are not justified in questioning its refusal to do so.

The government's substantial evidence as to the level of profits enjoyed by defendants from the sale of broad spectrum antibiotics was also relevant on the issue of conspiracy. Its relevance lies in the fact that, when profits were so enormous, defendants could have been expected, in the absence of a conspiracy, to experiment with price reductions in an effort to increase percentage of sales.

Defendants also complain that the evidence was improperly admitted because the government introduced no evidence of comparative prices from which the jury could properly conclude that defendants' profits were unreasonably high. The government did introduce evidence relating to the profits realized by the drug companies on penicillin and on other drugs. The evidence shifted the burden to defendants to convince the jury of the inapplicability of the standards suggested by the government.

Defendants argue that the jury was given an erroneous impression of their level of profits by the introduction of evidence relating to production costs rather than to total costs. Defendants had it within their power to introduce their own evidence on costs. The relevance of production costs was clearly established by the government's showing that defendants relied on production cost data both in internal memoranda and for establishing the industry-wide "rule of thumb" price level of approximately three times production costs.

3. *Parke, Davis*

The jury was instructed that the evidence concerning Parke, Davis was part of the total evidence that it should consider in reaching its verdict. It was then told, however, that "the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direction as a fact in itself. There is no profit here in speculating as to why Parke, Davis was not indicted. Parke, Davis is not on trial here * * *" It is claimed that the effect of this instruction was to detract from the force of the testimony concerning Parke, Davis. The defendants' theory is that Parke, Davis, which was not indicted, conducted its activities in the same manner as defendants and the accused co-conspirators, and that the jury should consider, therefore, whether defendants had not in fact been acting consistently with good business practices rather than with a conspiracy. The construction that defendants place on the charge is a possible construction but, in terms of the charge as a whole, that possibility seems hardly serious enough to warrant reversal.

4. *Licenses to Squibb and Upjohn*

The jury was instructed that "[t]he critical inquiry on this score is whether the limitation on Squibb and Upjohn, which barred them from manufacturing, was the particular objective of Bristol and was an agreed objective between Bristol and Pfizer in the issuance of that license." The instruction might have been construed by the jury to mean that but for the restriction Squibb and Upjohn would have had the right to manufacture tetracycline, whereas in fact there would have had to be a specific grant of permission.

It seems to me to be quite unlikely that the jury was seriously misled by this instruction. The settle-

ment did not grant Squibb and Upjohn the right to manufacture, and the real issue was whether Pfizer had declined to grant that right at Bristol's request.

5. *Bristol*

Bristol settled on its own behalf and on behalf of Squibb and Upjohn their suits against Pfizer and Pfizer's suits against them. In the settlement Bristol obtained licenses to manufacture and sell tetracycline, while Squibb and Upjohn obtained licenses which prevented them from making bulk sales.

The restriction imposed on Squibb and Upjohn precluding the resale of bulk tetracycline suggests an agreement to exclude competitors. In addition, the circumstances of the settlement—including the private discussion between McKeen and Schwartz (allegedly about the Broady wiretap incident about which all the other participants in the meeting already knew anyway)—were sufficient to justify the jury in finding that the parties agreed upon the desirability of keeping as small as possible the number of manufacturers and therefore granted Squibb and Upjohn only the minimal license that would satisfy Bristol in its settlement with Pfizer.

I would affirm the judgment.

APPENDIX B

Docket Nos. 32493–95

UNITED STATES OF AMERICA, APPELLEE

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY, APPELLANTS

Order Granting Rehearing in Banc

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for appellee.

Upon consideration thereof, and a majority of the active circuit judges concurring, Chief Judge Lumbard recusing himself, it is

Ordered that said petition be and it hereby is granted.

The parties may have until November 30, 1970 within which to exchange briefs, and the court will sit in banc and hear argument on December 15, 1970, at 2:30 P.M.

STERRY R. WATERMAN,
Acting Chief Judge.

NOVEMBER 12, 1970.

APPENDIX C

United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA, APPELLEE

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY, APPELLANTS

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

On April 16, 1970, a panel of this court filed opinions on the appeal taken from judgments of conviction entered herein against the defendants-appellants, Judge Moore, with whom Judge Friendly concurred, writing for reversal, Judge Hays writing for affirmance. On May 21, 1970, the United States of America, as appellee, filed its petition for rehearing and rehearing *in banc*. Briefs on behalf of the States of California, Hawaii, Kansas, North Carolina, Oregon, Utah and Washington were thereafter filed, upon leave granted, in support of the petition.

In accordance with our practice, the petition was submitted to the original panel for decision on the rehearing. Prior to any decision by the panel, a vote of the Judges (Chief Judge Lumbard having disqualified himself) indicated that on the basis of the panel opinion with respect to rehearing as it then stood, five Judges favored an *in banc* hearing and

three were opposed. An order granting an *in banc* hearing was entered on November 12, 1970.

Discussion thereafter continued among the Judges as to the content of the proposed panel opinion on the rehearing. As a result, the proposed panel opinion was modified to read as follows:

"MOORE, *Circuit Judge* (with whom Judge Friendly concurs):

> "The Government has sought rehearing of our direction of a new trial in this case. See 426 F. 2d 32. Its petition expresses particular concern with parts of Section I of the opinion, notably pp. 38–39, which it considers cast doubt on the time-honored practice of establishing an anti-trust conspiracy by circumstantial evidence. We intended nothing of the sort, as witness the sentence, "Had the Government relied on a general course of conduct throughout the years, these instructions might well have been apposite." We proceeded rather on the basis that the Government had limited itself in this case by paragraph 27 of the bill of particulars quoted at pp. 37–38.
>
> The petition for rehearing argues with considerable force that in arriving at that conclusion we failed to take adequate account of other portions of the bill of particulars and record. On reconsideration, we believe that the Government's point is well taken and we do not rely upon the express agreement contention as a ground for reversal. However, the Government misconceives our opinion in concluding that a different result would follow if we agreed with its argument. For as we indicated in our opinion, the other errors specified, when taken as a whole, were sufficient to deprive the defendants of a fair trial. When we have been so meticulous in protecting defendants' rights against possible prejudice in the jury room—even to the possible (and frequently speculative) effect of curtail-

ment of cross-examination (*see United States v. Padgent*, decided October 15, 1970, 1969-Term, Slip Op. p. 4453 and *United States v. Wolfson et al.*, decided November 11, 1970, 1968-Term, Slip Op. p. 4043)—it seems impossible to deny that the treatment which the charge gave to the highly important Parke-Davis defense alone might well have prejudiced the jury's judgment. When added to this there are the sections of the charge with respect to the testimony of the officers of the companies concerning the meetings of November 1953 and December 1955, pp. 39–40, the undue emphasis on the excess of selling prices over factory costs and the pattern which the trial took, it would indeed be difficult for an appellate court to say that these items may not have affected the jurors' votes in a criminal case so close as this.

If we did not believe reversal on these grounds to be required, we would be obliged to consider many other contentions advanced by the defendants. One of the most persuasive of these is Bristol's argument that there was insufficient evidence to warrant submission to the jury of the issue whether that company had conspired with Pfizer and Cyanamid to exclude others from the tetracycline market. If that be so, and we now incline to that view, a new trial would be required since the charge permitted a guilty verdict if the jury found either a conspiracy to exclude competitors or a conspiracy to fix prices. *Nash* v. *United States*, 229 U.S. 373, 379–80 (1913).

On this basis the petition for rehearing is denied.

HAYS, Circuit Judge, dissenting:

I would grant the government's application for rehearing.

This opinion of the panel which substantially limits the precedential effect of the opinion of April 16,

1970, is being filed simultaneously herewith. Upon a recanvass of the Judges who previously voted upon the *in banc* issue, four Judges, upon the basis of the foregoing opinion, vote to deny an *in banc* hearing and three Judges vote to grant the petition. The votes no longer include that of Judge Waterman who has assumed senior status in the interval.

Accordingly, upon the filing of the panel opinion as hereinabove set forth, it is ordered by a majority of the active judges eligible to vote thereon that the *in banc* order of November 12, 1970, be vacated and that the appellee's petition for a rehearing *in banc* be denied.

HENRY J. FRIENDLY,
Acting Chief Judge.

DECEMBER 1, 1970.

APPENDIX D

Charge to the Jury

The Court. Mr. Foreman, Mrs. Fields, gentlemen: The evidence, which I have just reminded you and will remind you again represents the bounds of the factual material on which you are to study and deliberate, is all in. You have heard the arguments of very able counsel urging the different inferences and conclusions they wish you to draw from that evidence. It is my duty to now instruct you on the law. It is your duty to follow and apply these instructions. Then, exclusively upon the evidence and under these instructions, it is your critical and vital function to determine the facts and seek a verdict.

As counsel and I have repeatedly mentioned, you are the sole and exclusive judges of the facts. You alone determine the weight of the evidence, the credibility of the witnesses, and the reasonable inferences to be drawn from the evidence. The things said by the lawyers and by me are not evidence. Neither the arguments of counsel nor any statements of mine can determine the facts you are to find. While I will be discussing some of the evidence with you in the course of this charge, your own recollection of the facts and your ultimate judgment as to where the truth lies will ultimately control the case.

Now, before turning to the specific charges and issues in this proceeding, I must remind you of certain and basic principles that you should have in mind as you proceed to your deliberations.

First, I remind you that the government as a party is entitled neither to greater nor to lesser consideration than any other party in a case in a court of law. All parties stand in this court as equals, entitled to equal justice. That same thought applies to individuals or corporations, to the rich and to the poor. Under your oath and under the assurances you gave before you were sworn as jurors, it can make no difference that the defendants here are corporations and presumably profitable corporations. They stand before you with the same rights and obligations as any other parties in the federal court.

Remember, too, that it is not for any of us—judge or jury—to make judgments of personal taste or preference concerning the governing law. It is not for me, in giving these instructions, to editorialize upon that law. I must seek to convey it to you as it comes to me from the Constitution, the Congress and our higher courts. You must receive it and heed it faithfully. These thoughts are part of the fundamental principles that ours is a government of laws, not of men.

Now, I have mentioned more than once, and just a few minutes ago, and I will repeat it not only because it is in this text I have written for myself but because it is fundamental, that your findings must rest exclusively upon the evidence lawfully before you. That evidence consists of sworn testimony and exhibits plus a number of facts which have been stipulated and are thus to be taken as true and undisputed for purposes of this case. I have mentioned repeatedly that a question standing alone is not evidence. If a question was asked and an objection to it sustained the question has no significance for your purpose. Similarly, you will recall instances where a question was asked and answered and then, on motion of counsel the answer was stricken. In such cases,

you must rule out of consideration anything that was ordered to be excluded from the evidence.

The fact that questions may have been asked by me is not meant to be, and should not be considered, a matter of any special significance to you one way or the other. Such questions are only part of the overall effort to elicit facts for your consideration. It is those facts as you will find them from the evidence that are important in the end.

I have told you, and I say again, that the evidence and these instructions must be the exclusive materials for your judgment if you are to arrive at a fair and just verdict. Things you have read in the newspapers or heard on TV or on the radio or from people outside this courtroom have no place here and must play no part in your deliberations.

It should make no difference in your judgment of the facts how often or how seldom or on what grounds any particular lawyer may have interposed objections or legal arguments of one kind or another. As a matter of fact, you probably have been aware that for a case of this size, with so many lawyers involved we have had a remarkably orderly and carefully conducted trial. But I have told you before, and I remind you now, though I think it is absolutely needless, that your attempt to discover the truth should not be concerned in any way with views about how any particular lawyer may have conducted his responsibilities, and they were the responsibilities of these lawyers, during the course of the trial.

In a few minutes I will be summarizing the charges against the three defendants as they are presented in this case. I have told you—you knew before I told you—that the charges are brought by means of an indictment under the constitutional and normal procedure for criminal cases. I emphasize once again

that an indictment is nothing more than a set of written charges, and the fact that an indictment has been returned should have no weight as evidence whatever in your consideration. It is no evidence of guilt; it does not in itself create even a suspicion of guilt; it is merely a complaint that informs the defendants, the Court and the jury of what the prosecution alleges.

The same is true of the bill of particulars to which you have heard references. That is merely a document which makes more specific and gives more details about the accusations in the indictment. All of these statements are simply accusations, not evidence that the accusations are true.

The defendants have responded to the charges by pleas of not guilty. This places upon the government the burden of proving their guilt, if any of them are to be found guilty, beyond a reasonable doubt. This is a burden that never shifts; it remains with the government throughout the entire trial. The question whether that burden has been sustained does not depend upon the number of witnesses or the quantity of testimony, but rather on the nature and quality of that testimony as it affects your total judgment.

As a corollary of the government's burden of proving guilt beyond a reasonable doubt, it is the law that the defendant does not have to prove his innocence. On the contrary, the defendant is presumed to be innocent of the charges stated in the indictment. That presumption exists in the defendants' behalf at the outset of the trial, and it continues throughout the trial. It is a presumption in favor of these defendants as I instruct you now, and it will remain in their favor as you proceed to your deliberations in the jury room. The presumption of innocence alone is sufficient to

acquit unless you, the jury, are satisfied beyond a reasonable doubt of the guilt of any defendant from all the evidence in the case.

Armed with the presumption of innocence, a defendant is under no duty to produce any evidence whatsoever. A defendant may rely upon the position that the prosecution has failed to sustain its burden or may rely upon evidence introduced in cross-examination of witnesses called by the prosecution. The question, now that the evidence is in, is whether the government has proved beyond a reasonable doubt each element of any or all the offenses charged in the indictment.

Because of the basic requirement in a criminal case of proof beyond a reasonable doubt, you must have clearly in mind what we mean by those words "reasonable doubt." To a large extent, the words are self-explanatory. But they reflect a key and basic concept and hence some definition and some elaboration is essential.

When we speak of a reasonable doubt, we mean, of course, a doubt that has some basis in reason, a doubt that remains with you after your consideration of all the evidence in the case. It is a doubt that may arise from the evidence that has been produced, or from a lack of evidence. It is a doubt that has some substance. It is frequently said, and I repeat in this charge, that it is not merely a whim, or a caprice, or a speculation. Proof beyond a reasonable doubt does not mean proof to a mathematical certainty or proof beyond any conceivable doubt whatsoever. If it meant that, there could almost never be a conviction in any criminal case. On the other hand, evidence which is sufficient only to arouse or create a mere suspicion is not adequate proof in a criminal case, no matter how strong the ground or basis for the suspicion.

A reasonable doubt in our context means a doubt of the kind that would cause you to hesitate to act in the grave and important affairs of your own life. If such a doubt remains with you after your fair and impartial consideration of all the evidence in the case, then you must find any defendant with respect to which you have such a doubt not guilty.

In other words, if you have considered the evidence and find that you are not satisfied of the guilt of any defendant, if you do not have an abiding conviction, amounting to a moral certainty, of the defendant's guilt, then you have a reasonable doubt and it becomes your duty to acquit.

Conversely, if, after you have fairly and impartially considered all the evidence, you can say that you do have an abiding conviction of a defendant's guilt, the kind of conviction on which you would be willing to act in your own grave and important affairs, if you have that kind of conviction, amounting to a moral certainty, then you have no reasonable doubt, and it becomes your duty to convict. A reasonable doubt cannot arise merely from sympathy for a defendant or a desire to avoid performance of an unpleasant duty.

Now, as you have heard repeatedly, the government's attempt to sustain the burden of proof on its basic conspiracy charge rests entirely upon circumstantial evidence, and it is necessary to say some general things about that now and some more specific things later on.

You undoubtedly know that there are, generally speaking, two types of evidence from which a jury may be asked to find the truth as to the facts of any case. One is what we call direct evidence, such as the testimony of an eyewitness to some ultimate fact in the case. The other is indirect or circumstantial

evidence, meaning the proof of one or more circumstances pointing to the existence or non-existence of some ultimate fact. The two kinds of evidence are commonly used by all of us in our daily lives, outside the courtroom as well as inside.

But it can do no harm, even though it may be unnecessary, to stop for an extra minute and suggest a small example of the difference between these two kinds of evidence.

If it were an ultimate fact in some case, and I take an ultimate fact that has nothing to do with this case, if it were the ultimate question whether it had been raining on some particular occasion, a party might produce a witness who testified that he was out-of-doors at that time and through his senses saw and felt that it was raining. Such testimony would give you direct evidence of that ultimate fact or question about whether it was raining.

On the other hand, and this is a lawyer's kind of hypothetical, one or more witnesses might testify that they were indoors where they couldn't see outside and couldn't know directly by their senses whether it was raining or not but that they saw people entering the place where they were, carrying dripping umbrellas and wearing wet rain gear. Such evidence could serve as circumstantial evidence of the ultimate fact or question was it or was it not raining.

Either kind of evidence might or might not satisfy you as to the ultimate fact in issue and that would depend, amongst other things, on whether you found a particular witness or witnesses capable of reporting accurately and intending to report to you truthfully what they had observed. From either of the kinds of evidence I have described, you might equally find it was or was not raining, depending both on how

you appraise the witnesses and on all the circumstances in that particular hypothetical case.

The principle to be noted here is that circumstantial evidence, when it is admitted into the record, is entitled to the same kind of consideration by the jury as direct evidence. It is not on any different or lower plane. It deserves such consideration as you in your judgment may think it deserves.

No greater and no lesser degree of certainty is required when the evidence is circumstantial than when it is direct. In either case the jury is to follow the test of reasonable doubt as I have undertaken to give it to you.

I postpone now some further general principles about which I will have to talk later on and turn to the allegations of the indictment before us. That indictment, as you know, contains three specific charges against each of the three defendants on trial. The charges are laid under the law of the United States known as the Sherman Act. Before I quote the words of that statute, let me remind you to have in mind that each count charges a separate offense and that the guilt or innocence of each defendant, although they have been tried together, is to be determined separately and distinctly on each of the three counts.

The Sherman Act in two short sections states the substantive law applicable to this case and I will read those for you in their pertinent parts.

Section 1 of the Act says this:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is declared to be illegal. Every person who shall make such contract or engage in any such combination or conspiracy shall be guilty of a misdemeanor.

Section 2 reads this way:

> Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor.

I mention, to dispose quickly, of one or two points under the statute, first, it is not disputed that when the statute refers to a person, it includes corporations such as the defendants here on trial.

Secondly, it is stipulated that the defendants were at all pertinent times engaged in interstate commerce with respect to the goods here in question and therefore there is no issue in this trial concerning the applicability of the statute in this respect.

I come, then, to the specifics of the offenses charged in the indictment. The first count, asserting a violation of Section 1 of the Sherman Act, charges in substance that the three defendants, Bristol, Cyanamid and Pfizer, together with Squibb and Upjohn, which are named as co-conspirators but not as defendants, engaged in an unlawful combination and conspiracy in the unreasonable restraint of interstate trade and commerce in the manufacture, distribution and sales of broad spectrum antibiotics and broad spectrum antibiotic products.

The broad spectrum antibiotic market to which this charge, as well as the other two, relates is alleged to consist of four drugs: Aureomycin, Terramycin, tetracycline and Chloromycetin. All four of these are alleged to be effective against substantially the same range of micro-organisms and are asserted to be substantially interchangeable in medical use. In adddition, it is alleged, Aureomycin, Terramycin, and tetracycline have closely similar molecular structures.

According to the indictment, the conspiracy or unlawful agreement alleged in the first count had four terms or objects or purposes:

(1) that the manufacture of tetracycline would be confined to Pfizer, Cyanamid and Bristol.

(2) that the sale of tetracycline products would be confined to the three defendants, together with Squibb and Upjohn.

(3) that the sale of bulk tetracycline would be confined to Bristol, and bulk tetracycline would be sold by Bristol only to Upjohn and Squibb.

(4) that the sale of broad spectrum antibiotic products by the defendant companies and the two co-conspirator companies would be at substantially identical non-competitive prices.

The indictment goes on to allege various "means and methods" employed to effectuate the conspiracy. I will return to this subject after a while and consider these alleged means and methods at some length.

Turning for a moment to the second count, this rests on Section 2 of the Sherman Act. It charges in substance that the three defendant corporations, again in concert with Squibb and Upjohn, engaged in an unlawful combination and conspiracy to monopolize interstate trade and commerce in the manufacture, distribution and sale of broad spectrum antibiotics and broad spectrum antibiotic products. The terms of the conspiracy alleged under this count are the same as those alleged in Count 1. Similarly, this count charges the same means and methods as those under the first count.

The third count, also claiming a violation of Section 2 of the Sherman Act, charges that, by the same means and methods as those alleged in the two preceding counts, the defendants did monopolize interstate trade and commerce in the manufacture, distribution

and sale of broad spectrum antibiotics and broad spectrum antibiotic products.

You will have noted that the second count charges a conspiracy to monopolize while the third count charges the achievement of the objective to that alleged conspiracy, namely, the actual monopolization, which is a separate offense under the statute.

Now, having sketched the charges in the indictment, I will go back and consider with you in more particular detail the legal significance of these charges, the things which must be proved beyond a reasonable doubt to sustain a conviction on any of them, and the resulting issues presented for your resolution.

A basic and essential element in all three counts is the charge that the defendants, during the indictment period, were joined in an unlawful combination or conspiracy. You will note, by the way, that the two words "combination" and "conspiracy," while they are both used in the statute and in our discussion of the statute, may be considered for our purposes as having but a single meaning, which I will proceed to elaborate in a minute or so.

You will also note that I have referred to this as an essential element in all three counts, although only the first two charge the crime of conspiracy as such. I will expand a bit on this point when I come to talk further about the third count, which charges the substantive offense of monopolizing. Postponing that, I will define for you now the meaning of the word "conspiracy," and charge you that this explanation is what should guide you in determining whether a conspiracy of the kind alleged has been established by the evidence.

The type of relationship condemned by law as a conspiracy is often described in shorthand terms as a "partnership in crime." To create such a relationship, two or more persons must enter into a mutual agree-

ment or understanding that they will act together for an unlawful purpose. In the circumstances of the present case, before you may find any defendant to have conspired, you must find that at least two of the defendants were parties to the conspiracy.

In the absence of an agreement or mutual understanding or meeting of the minds there can be no conspiracy. It is the agreement to act together for an unlawful objective that constitutes the gist of this crime.

This central requirement of an "agreement" does not mean, however, that in order to create an unlawful combination or a conspiracy, the parties must meet together at some time and place or, indeed, that they must meet together at all. Nor does it mean that their undertaking must be embodied in express or formal contractual statements, or express words of any kind. Your experience tells you—and the law recognizes—that this is rarely the way in which criminal conspiracies are formed. It is sufficient, therefore, if some character or manner of communication is had between the defendants which results in a definite, mutual understanding of the common, unlawful objective or purpose to be accomplished, and a definite, mutual understanding that they will combine their efforts to that end.

Because express agreements are neither necessary nor common in establishing unlawful conspiracies, the crime is one which may be shown from circumstantial evidence as to a course of conduct or business dealings. In other words, whether the prosecution has sustained its burden of proving a conspiracy must frequently be judged by what the jury finds the parties actually did rather than from the words they used. The unlawful agreement may be shown if the proof establishes a concert of action, with all the

parties working together understandingly with a single design for the accomplishment of a common purpose. It is not essential to such a showing that all the parties should have acted exactly alike. Nor is it a defense if a party is found to have been forced by economic or other pressure to join in the concert. Acquiescence and participation in the illegal scheme are as much a violation of the Sherman Act as the creation and promotion of one.

On the other hand, it is the government's burden to show such acquiescence and participation as a matter of conscious choice beyond a reasonable doubt. It is not sufficient to show that the parties acted uniformly or similarly or in ways that may seem to have been mutually beneficial. If such actions were taken independently as a matter of individual business judgment, without any agreement or arrangement or understanding among the parties, then there would be no conspiracy, even though the separate actions were substantially concurrent and tended toward the accomplishment of similar objectives separately pursued by the individual companies.

You will note that the basic charge of a combination or a conspiracy running through the three counts alleges a single, overall conspiracy, with the same terms and objects and employing the same means and methods, and this is central and essential throughout the indictment.

You are also aware—and I will be mentioning this again—that the defendants are not all charged with participation in all the acts or practices alleged, and they are not even charged with simultaneous entry into the claimed conspiracy. These aspects of the evidence in this particular case lend to several points which you must have in mind as you go to think about what your verdict should be.

In the first place, if any of these defendants is to be found guilty, this finding can rest only upon proof of the conspiracy charged in the indictment. You could not, for example, convict any of the defendants for engaging in other wrongful conduct or for joining in other or different conspiracies. I hasten to add, this is not to imply that there were, or that anyone suggests, such other or different things, but I merely emphasize here the fundamental principle that unless a defendant is found guilty upon the charge as he met and defended it, he or it cannot be found guilty at all.

Now, this does not mean, however, that each defendant must be found to have participated in or even to have known about each act or aspect of the conspiracy. If you find the conspiracy as charged, a party is held responsible for joining and participating in it even if its role was less major than others and even if such participation existed only for the part of the life of the conspiracy. When a defendant enters into a conspiracy, he becomes responsible in law for each and every act of the other members in furtherance of the conspiracy, including such acts occurring before he joined and without his direct participation or knowledge.

The vital question with respect to each separate defendant and the separate evidence directly relating to each is whether that defendant entered into the alleged conspiracy, if the conspiracy existed. If such entry is shown, then the act of association creates, as I have said, a kind of partnership in crime, and each member of the conspiracy becomes in a relevant sense the agent of all. This means that acts or declarations of one conspirator which occur during the conspiracy and in furtherance of a common object become the acts and declarations of all and may be considered evidence against all. Bear firmly in mind, however,

that you may not convict any of the defendants unless the evidence, considered specifically and individually in relation to that defendant, establishes its membership and participation in a conspiracy charged by the indictment.

Now I must expand a little bit on this last point. You have been given evidence during the course of this trial emanating from one or two of the defendants in the absence of one or both of the others. Ordinarily, as to an absent defendant, such evidence might well be excluded as hearsay. But, on the agency theory I have just mentioned, such declarations or statements are admitted against an absent member when they are made during and for the conspiracy. That omits, however, the foundation and initial question as to who is a member.

The resulting problem is resolved, and you will resolve it, in this way: If, but only if, there is substantial independent evidence to show a party's membership in a conspiracy, declarations of the kind I have just mentioned made by other members may be considered against that party. The independent evidence need not be sufficient in itself to show the absent party's membership in a conspiracy. But it must have a substantial tendency in that direction.

And so, before you may consider the declarations or statements of one defendant against another, you must satisfy yourselves that independent evidence exists to warrant use of such evidence against that other. This point applies equally to declarations or statements of either of the alleged co-conspirators, Squibb and Upjohn.

Now I move from the general principles of conspiracy law to the particular offense charged in the first count of the present indictment, and this quite briefly is that the defendants conspired to achieve

the four ends or objectives I read to you in listing the so-called terms of the alleged conspiracy. In substance, those four may be summarized under two headings: first, as a conspiracy to exclude other companies from the manufacture or sale of tetracycline and, second, as a conspiracy to fix the prices of broad spectrum antibiotic products. While both kinds of objectives are charged, either one would be sufficient to make out the type of violation denounced in the Sherman Act and in Count 1 of this indictment. And while the prosecution contends that the defendants and the alleged co-conspirators attain their objectives, this is not, strictly speaking, an essential element of the case. If the government had sustained its burden of proving a conspiracy for either type of purpose, the offense would be established whether or not its ends were accomplished.

Now, as to the term or objective concerning the exclusion or elimination of competition, I charge you that the Sherman Act outlaws any conspiracy—as I have defined that term for you—which is made with the purpose and intention of unreasonably barring acts or potential competitors from the market or eliminating competition among and between the alleged conspirators. Thus, if it was agreed or understood that the parties were to exclude others from making or selling tetracycline, this goal amounts to a form of unlawful restraint of trade. Similarly, if there was a conspiracy to have bulk sales made exclusively by Bristol, with Cyanamid and Pfizer committed to refraining from competition for bulk customers—or if it was agreed that no companies but Squibb and Upjohn would be permitted to make bulk purchases—such arrangements would constitute the unlawful objective alleged in Count 1.

Now I emphasize here—and I trust you will have sharply in mind throughout—that the gist of the crime is the conspiracy or unlawful agreement. So, for example, you could not convict merely upon a finding that the manufacture and sale of tetracycline were confined in the way the government alleges, that is, on a finding that only the defendants manufactured tetracycline, that only the defendants, plus Squibb and Upjohn, sold tetracycline products, and that only Bristol sold bulk, and only to Squibb and Upjohn. If this situation came about through the independent actions and decisions of the companies involved—with no conspiracy, as I have defined the term—the law was not violated.

Unless you conclude that the defendants were acting understandingly in concert, or conversely, if you find that they were acting independently, prompted by independent judgments and independent company policies, you may not find that there was an unlawful combination. Likewise, if you should conclude that the prosecution has failed to demonstrate that any one of the defendants was not acting entirely on its own, you must find that any such defendant was not a member of the combination or conspiracy, even though you determine that such a combination or a conspiracy did exist with the remaining two defendants as members.

Similar principles apply with respect to the alleged objective of price-fixing. The Sherman Act declares illegal any combination formed for the purpose of raising, lowering, setting, fixing or stabilizing the price of a commodity in interstate or foreign commerce. Even if the members of such a combination are in no position to control the market, their combination to interfere in any such ways with the free play of market forces would be an unlawful activity.

This prohibition is a broad and strict one. If there is a conspiracy to tamper with prices, the law is violated whether or not the conspirators agree to charge identical prices. It is illegal to agree upon a range of prices or to agree upon some maximum or minimum price. The same is true of agreements to set list prices, the amount of cash discounts, or similar factors affecting price terms. A conspiracy to fix list prices is forbidden even if such prices are used only as starting points for the allowance of discounts and are not used in themselves as the amounts to be charged in particular sales or classes of sales. If a price-fixing agreement exists, it is no defense that the prices charged are reasonable, nor is it a defense that the conspirators engage in competition with respect to matters other than price. Furthermore, if such a conspiracy existed with respect to one or more classes of trade or groups of customers, it would be unlawful even though it did not extend to other classes or groups.

Remember, once again, that it is the conspiracy which is the heart of the matter, whether or not the goal of the conspiracy is achieved. If there is a conspiracy to fix prices, the statute is violated. If there is no conspiracy, the fact that prices are uniform in the marketplace is not in itself any violation of the law.

Your experience teaches you—and the governing law takes into account—that uniform prices commonly result from the forces of supply and demand operating upon independent sellers in the market. Where this is so, the Sherman Act is not violated. On the other hand, as I will be mentioning again, uniform prices, maintained at a constant level over long periods of time—if such prices are artificial and unrelated to supply and demand or to other variations or changes in the pertinent economic factors—may be considered by you as some evidence from which an agreement or

understanding or concerted action to restrain trade may be inferred.

Let me summarize up to here the point about price-fixing. If you find that the defendants (or any two of them) agreed upon list prices or publishing prices, or on prices to be charged for sales to any class of customers, you must find them guilty under Count 1 of a conspiracy in restraint of trade, providing, of course, that you also find the other elements of the crime to be covered in these instructions.

Returning now to the second and third counts of the indictment, and repeating their substance very briefly, these charge, respectively, that the defendants, first, engaged in a conspiracy to monopolize, and, second, committed the substantive offense of monopolizing the manufacture, distribution and sale of broad-spectrum antibiotics and broad-spectrum antibiotic products in violation of Section 2 of the Sherman Act.

In considering both of these counts, you must now apply the meaning of the word "monopolize" as it is used in the statute and alleged in the indictment.

That term "monopolize," in the sense pertinent here, means the joint acquisition or maintenance by the members of a conspiracy, formed for that purpose, of the power to control and dominate interstate trade and commerce in a commodity to such an extent that they are able, jointly and as a group, to exclude actual or potential competitors from the field, and to raise or control prices, provided that the group has the intention and purpose to exercise such power.

That's a terribly long sentence. I will re-read it.

Again, the term "monopolize," as we use it here, means the joint acquisition or maintenance by the members of the conspiracy, formed for that purpose, of the power to control and dominate interstate trade and commerce in a commodity to such an extent that

they are able, jointly and as a group, to exclude actual or potential competitors from the field, and to raise or control prices, provided that the group has the intention and purpose to exercise such power.

It is not necessary to make out the offense that the power and intent should extend to the exclusion of all competition or all competitors; it is sufficient if it reaches an appreciable part of the commerce in question and there is power and intent to exclude competition to a substantial extent.

The critical questions here are questions of power and intent. The material consideration in determining whether a monopoly exists is not that prices are actually raised or that competition is actually excluded, but that the power exists to raise prices or exclude competition when a group acting in concert desires to do so.

A conspiracy to monopolize, as charged in Count 2, or the substantive offense of a monopoly actually achieved, as charged in Count 3, must relate to some identified market in a specified commodity or commodities reasonably interchangeable in their uses by purchasers or consumers of such goods. Here, you will recall the market alleged is claimed to be comprised of four broad-spectrum antibiotics: Aureomycin, Terramycin, tetracycline, and Chloromycetin. In appraising both the conspiracy charge in Count 2 and the substantive charge in Count 3, you will deal, among other things, with the evidence as to market shares held by the defendants and others to determine whether the alleged power reached to an appreciable part of the commerce in question. You will consider in this connection the relative positions of the alleged conspirators in relation to the changing position of Parke, Davis, which, as you know, is not alleged to be a conspirator and which controlled

a large and, until 1961, an increasing share of the market in question with its patented product, Chloromycetin.

Now, I emphasize, at the risk of undue repetition, once again the central importance here of the contention that the defendants acted in concert—that they were engaged in a combination or conspiracy as that has been defined for you. It is in no respect a violation of the law that a number of corporations, each acting individually and independently for itself, may hold or control an appreciable part, or all, of the market for a commodity sold in interstate commerce. Furthermore, it is not the law that every "monopoly," in the general sense of that term, is illegal. So it is important to remember in this case that a patent confers a lawful monopoly upon the inventor or assignee of the inventor of a useful product. In the absence of conspiracy with others, the holder of such a patent monopoly may keep and enjoy it for himself, or may license or refuse to license it as he sees fit. Similarly, two owners of patents may cross-license each other and may decide, lawfully and independently, not to issue licenses to others. Where such patent rights are exercised in this way independently, the holder or holders of patents are free under their patents to exclude competition and control prices without violating the Sherman Act or any other law in any way.

What is forbidden, however, and what the government charges was sought and accomplished here is an agreement among competitors to use and restrict patent licenses as a means of excluding other competitors and controlling prices of the patented commodities. And this is the vital sense in which the charge of conspiracy is essential to both the second and third counts as well as to the first. You may not treat

as unlawful the exercise of patent rights, or any licenses of such rights, or any refusals to license, unless you are persuaded beyond a reasonable doubt that such actions were taken pursuant to the unlawful conspiracy charged in the indictment.

With these thoughts in mind, you will determine under Count 2 whether there was a conspiracy to monopolize within the meaning of both those terms, "conspiracy" and "monopolize," as they apply in this case. If you find that the defendants, or any two of them, entered into such a conspiracy, that would warrant a conviction of guilty on the second count whether or not the objective of monopolizing was achieved. If you find that such a conspiracy existed, with two of the defendants participating but not the third, then you should, of course, acquit that remaining defendant. And again, unless you find that at least two so conspired, you must acquit all three.

You should proceed, in the circumstances of this particular case, to a decision on the third count only after you have decided the second. An acquittal on the second count logically and necessarily requires an acquittal on the third. If you convict on Count 2, however, you should then consider whether the defendants achieved the goal of the conspiracy to monopolize—that is, whether they succeeded in monopolizing the trade and commerce in question by actually acquiring the power to control prices and to exclude competition. I remind you that such a finding, if you make it, is sufficient if you determine that the requisite power and intent existed, whether or not you find actual exclusion of competitors or actual raising of prices.

I have spoken several times up to now touching the subject of intent, but it is necessary to mention again and separately that this element of intent is

part of what the government must prove in this criminal case. Before you may convict on any count, you must be persuaded that the defendants, or any two of them, entered knowingly and purposely into the conspiracy charged. Similarly, you must find under the third count that they knowingly and deliberately took the combined steps leading to the creation of a monopoly as a necessary and intended consequence of what they did.

The government is not required to prove, however, that the defendants had a specific intent, as we call it in the law, to violate the law or that they considered their actions to be illegal. It need not be shown, in other words, that they intended to restrain or to monopolize the interstate commerce in question if the evidence establishes that they knowingly and purposely took the actions amounting to the violations I have defined for you. If intentional conduct is shown in this sense, it would not be a defense that the defendants thought they were behaving lawfully or sought to achieve results they deemed beneficial or somehow desirable.

Now, intent is a fact to be determined like other facts. In deciding this question, you may consider all the actions shown by the evidence, the explanations you have heard for such actions, and all the attending circumstances. You may take into account the evidence that defendants had legal advice and the extent to which they may appear to have acted without such advice, although neither this item nor any other is likely to be decisive in itself. Ultimately, as I have said, you must appraise all the evidence and draw your inferences, as reasonable and experienced people, as to the intent with which the defendants proceeded.

Since intent is a quality of the human mind, and since we deal here with defendants which are corporations, this is a suitable point at which to mention the subject of a corporation's responsibility for the actions of its agents. Your problem, of course, is to determine whether these corporations have done the things charged, with the intent charged, by virtue of and through the acts of their officers and employees.

In general, corporations are held responsible for the acts and statements of their agents when such acts and statements are performed or made within the scope of the agents' express or apparent authority. It is not necessary for a finding of such authority that the agent or employee be specifically authorized or instructed to commit the particular act or make the particular statement. There may, of course, be such express authority in a particular instance, but there is also apparent authority, which is the power or competence outsiders would normally assume the agent to possess, judging from his position with the company, the general scope of his known functions, and the circumstances surrounding his past conduct. As I have said, a corporation is liable for the acts of the agent within his apparent authority as well as his express authority, even if such actions may be contrary to instructions and in violation of the law.

The scope of an agent's authority may be inferred from all the circumstances in which he acts. You may find actions authorized where they were long continued, where they were long known, or where they appear from all the facts to have been reasonably expected based upon the status and general functions of the officer or employee in question.

Now, you may recall my mentioning at the outset that you should be alert for matters of time and chronology as the evidence came in in your effort to

build and understand the total picture from that evidence. I want to mention some brief final thoughts under this general heading.

For one thing, matters of time will be of importance to you as you follow the requirement that each individual defendant is to be considered individually and separately. It is charged, as you know, that Pfizer and Cyanamid formed a conspiracy in or about November 1953 and that Bristol entered only some two years later, in December 1955. You will have in mind, as another example on this subject, that Cyanamid is not shown to have participated in any of the negotiations of December 1955 or the settlement agreements of March 1956 among Pfizer, Bristol, Squibb and Upjohn.

You have been instructed that if a party joins a conspiracy, its liability is not lessened because it may have participated in less than all aspects or for less than the entire period. But the timing and order of events must obviously concern you as you proceed to determine whether and when any of the defendants entered into any conspiracy at all.

A further point on the question of time is this: While the prosecution alleges approximate dates for the commencement of the conspiracy, and charges that the conspiracy continued up to the date of the indictment in August 1961, it is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges. If you find all the other elements established, it would be sufficient for Counts 1 and 2 if you found that the conspiracy existed and was continued for any substantial portion of the five-year period ending at August 17, 1961. Similarly, on Count 3, the charge of monopolizing, in addition to the other requirements, the government will have satisfied its burden in this

respect if it has proved beyond a reasonable doubt that the defendants monopolized the relevant trade and commerce for some substantial portion of the same period.

Concluding now on this question of time, I want to mention one question with which you need not be concerned as you think about the dates and the period involved in this case. I said on the opening day that you might have to consider the statute of limitations. It turns out, however, that there is no controversy in the case over that. You should deem it undisputed, because it is undisputed, that the indictment was timely filed within the five-year period preceding August 17, 1961, and is valid so far as the statute of limitations is concerned.

I mentioned somewhat earlier, and postponed discussing, the portion of the indictment which alleges some 12 means and methods by which the defendants are claimed to have effectuated the combination and conspiracy. I return to that somewhat extended subject now.

While the indictment asserts 12 of these so-called means and methods, the prosecution is not required to prove that all of them were agreed upon to carry out the alleged conspiracy or that all were actually used or put into operation. But it is necessary, before there may be a conviction, that the evidence establish to your satisfaction that one or more of these means or methods were agreed upon for use to effect some object or purpose of the conspiracy.

To put that same basic thought another way, though you may find that the defendants, or some of them, took most or all of the actions characterized in the indictment as "means or methods," this alone would not justify a conviction unless you also find that one or more of such actions were taken pursuant to, and

for purposes of effecting or effectuating, the conspiracy charged by the prosecution.

You should also have in mind that none of the actions or arrangements considered under this heading is required to be shown to have been unlawful in itself in order to warrant a conviction. Again, as throughout this case, the core of the matter is the alleged conspiracy and the question whether any and all of these actions were taken because of, and for the objectives of, such a conspiracy.

Now, the first two of the alleged "means and methods" relate to the granting and refusal of patent licenses. The first charges, and I quote, "Cyanamid licensed Pfizer and Bristol to use its Aureomycin patent in the manufacture of tetracycline and refuse to license all other applicants."

The second alleges that "Pfizer licensed Cyanamid and Bristol under its tetracycline patent and refused to license all other applicants."

As to the first of these two, there is no evidence that anyone other than Pfizer and Bristol requested from Cyanamid a license under its Aureomycin patent. The evidence in this respect would appear to show no more than the existence in Cyanamid of a general policy against the licensing of its Aureomycin patent.

With respect to both of these first two means and methods, I remind you of my earlier instructions that a patent holder, in the absence of an unlawful agreement or conspiracy, is free to license or refuse to license whomever he wishes. You should also understand that the mere agreement to cross-license between companies which hold blocking or conflicting patents is not a violation of the antitrust laws. Indeed, such interchange of patent rights in settlement

of controversy is often necessary in order to permit technical progress.

In addition, I think it has already been made clear to you that the holder of a patent may license others to make, use or sell the discovery, with such restrictions as may be within the limits of the patent grant. Thus, in the absence of conspiracy, the owner of a patent on a product may license another company to manufacture and use that product solely in the manufacture of some other product. The kind of license you understand that was involved in the Pfizer use of Aureomycin to make tetracycline.

The holder of patent rights has, in other words, a form of lawful monopoly and freedom to exclude others from sharing it. But the patent laws as I have told you, do not authorize him to agree with his licensees that he will exclude or restrict others by refusal or limiting grants under his patent to such other or third parties. Agreements of this kind come within the prohibitions of the antitrust laws rather than the privileges granted by the patent laws.

Now the government does not claim that any of the license agreements involved in this case or indeed any of the written agreements in this case is in itself unlawful or in combination with any of the others, without reference to other facts. Accordingly, you may not infer an antitrust violation merely from the existence of such agreements or from any of the terms contained within them. Your task here is to consider the grants of licenses together with the refusals or absence of such grants to others, in the light of all the testimony and documentary evidence concerning licenses and related problems, in order to determine whether this evidence tends to show the presence of a conspiracy, the absence of a conspiracy, or nothing either way.

In considering the extent to which licenses were granted or refused or not granted, and in appraising the total pattern of licensing arrangements, you should consider what would have occurred in the normal course of lawful business conduct. To what extent would normal and independent business judgments by the companies involved have dictated the arrangements shown by the evidence? To what extent do the arrangements, in light of all the other circumstances, tend to support the government's thesis that patent licenses and refusals to license reflected some agreement or understanding by which the alleged conspirators undertook to restrict entry into the market and to restrict competition, either among themselves or with others?

Questions of this kind are what you should be asking with respect to the matter of licensing and with respect to the entire pattern of conduct upon which the government bases its charges.

As we proceed through the various things alleged as means and methods of the conspiracy, consider whether each one fits within a normal pattern of independent business behavior by each of the companies involved, or whether each or any of these things tends to show action in concert for one of the unlawful objectives charged in the indictment. Then, in your eventual weighing of the case as a whole, ask yourselves the same question about all of these specific factors viewed together and in their total setting.

Another means and method by which the indictment charges that the conspiracy was effectuated is that, and I quote, "Cyanamid assisted and cooperated with Pfizer in obtaining for Pfizer a patent on tetracycline."

This allegation refers, as I am sure you recall, to the settlement between Pfizer and Cyanamid of the first patent interference relating to tetracycline, the actions taken by Cyanamid pursuant to that settlement leading to a concession of priority to Pfizer by Cyanamid, and to the various actions and positions taken by Cyanamid in the second or so-called "salt" interference proceeding.

In connection with both interferences, you will recall, the government's claim is that Cyanamid supported and furthered Pfizer's efforts to obtain a patent, and that this reflects and tends to prove the kind of unlawful agreement between competitors which is the basic element of the government case. Cyanamid argues that it opposed Pfizer more often than it took positions supporting Pfizer, and that the conduct in question was, on its face and as explained by Cyanamid's representatives, nothing more than the self-interested action of an independent company pursuing its own legitimate objectives.

The government says that the number of motions is not a substantial criterion and that actions and statements of Mr. Edelblute for Cyanamid were basically cooperative rather than adversary.

In connection with this subject, I should remind you of things you learned about the patent interferences, and perhaps add one or two other thoughts on this subject that may help you to understand the pertinent Patent Office context.

Under our system of patent law, the patent is granted to the first inventor, not to the applicant who is first to file. So when the Patent Office determines that two or more applications are pending for the same invention, it declares an interference proceeding, preceded by the notice to copy claims with which you have become familiar, so that the question

of which applicant was the first inventor can be resolved.

An interference is declared only when the patent examiner has made an initial decision that the subject matter of the claim in the interference is patentable, and has so advised the applicants. Otherwise, the parties and the Patent Office would be subjected needlessly to useless, and often lengthy and expensive, procedures to determine priority where it is apparent from the outset that none of the parties involved had a right to a patent.

However, this initial or tentative determination that one of the parties will be entitled to a patent remains subject to reconsideration and change, as has been illustrated in this case. Even though an interference has been declared, the end result may be a determination that none of the applicants is entitled to a patent.

Upon the declaration of an interference, separate or ex parte prosecution of each application involved in the interference is suspended. Although normally each patent application is kept secret in the Patent Office and handled ex parte, as we say, during an interference each party has access to the official application file of the others. When the interference proceeding ends and the parties resume their separate prosecutions, the rule of secrecy is once more enforced.

After an interference is declared, each party files a preliminary statement giving the facts and dates which he hopes to prove. Before actual trial in the interference begins, there is a motion period during which a party can try to win on procedural grounds or seek to narrow or broaden the scope of the interference. If the proceeding is not resolved in the motion period, it goes on to an actual trial during which testimony is taken, documentary evidence is introduced, briefs are submitted, and hearings are held.

If the Patent Examiner during the pendency of the interference finds a reference of other reason which in his opinion renders the subject matter unpatentable, he may change his prior ruling on patentability and dissolve the interference, as I have mentioned already. Any of the parties is entitled during the interference proceeding to seek such a result, that is, to claim that patentability is not shown and that no patent should issue to any of the applicants concerned.

As is true with respect to other types of litigation, it is entirely lawful for the parties to an interference, in order to avoid the substantial delay and expense often involved in such proceedings, to seek amicable settlement of their dispute by agreeing to an informal exchange of evidence on priority and to a good-faith attempt to determine from that evidence who was the first inventor.

They can also agree in that connection that the loser will file a concession of priority in the Patent Office and that the one in whose favor the determination of priority is made will license the other. Similarly, cross-licensing of patent rights made in connection with such an agreement, unless made pursuant to a conspiracy to fix prices or exclude competition, is a lawful arrangement.

Now, in connection with the charge that Cyanamid assisted Pfizer to obtain a patent in order to seek unlawful conspiratorial objectives, you will, of course, want to review the evidence you have heard concerning the extent to which the positions of Pfizer and Cynanmid may have indicated cooperation and mutual support, and the extent to which such actions displayed the individual pursuit of their individual interests by these separate companies.

To what extent, if at all, did Cyanamid actually appear to be helping Pfizer to obtain a patent under

which Cyanamid would thereafter be required to pay royalties and non-licensed producers of tetracycline might be excluded? To what extent did Cyanamid, pursuing its own goals, oppose and resist Pfizer's application on legitimate and available grounds?

Considering both the evidence of what Cyanamid did and the explanations of its officials for these actions, was this the normal and self-regarding conduct of a competitive company? Or did it reflect the existence of an understanding and joint purpose by Cynanmid and Pfizer to pursue the objective of excluding competition or fixing antibiotic prices?

You should carefully consider all of the testimony and documentary evidence concerning the first and second patent interferences, the Pfizer-Cyanamid settlement of the first interference, and the circumstances surrounding these proceedings, to determine whether this evidence tends to show the presence of a conspiracy, the absence of a conspiracy, or nothing either way.

Another claim concerning alleged means and methods made by the government is that each of the defendants withheld pertinent and material information from, and otherwise misled, the Patent Office prior to issuance of Pfizer's tetracycline patent. All of the evidence on this subject relates to the period before January 11, 1955.

Somebody who is aware that this may take a number of minutes has suggested that this would be a good point for a recess and I concur in that opinion. Let us take ten minutes and I will resume.

(Recess.)

The COURT: I had just started on the alleged "means and method" which consists of the charge that the defendants withheld material information from and otherwise misled the Patent Office prior to issuance

of the Conover, Pfizer's tetracycline patent, and I had said, reminding you of another point in which time is important, that all of this evidence and this subject relate to the period before January 11, 1955, and that is significant here because although the indictment includes Bristol in this charge, you will recall it is not actually claimed that Bristol was a member of the conspiracy if one did exist prior to December 14, 1955. In view of this, and in view of the testimony of Dr. Taylor with respect to Bristol's activities in the Patent Office, you are to consider that the allegations of the indictment dealing with Bristol's conduct in the Patent Office have been withdrawn from the case.

However, Dr. Taylor's testimony remains in the case with respect to any other issue it may affect, and you may consider Bristol's knowledge and state of mind during the Patent Office proceedings to the extent, if any, that this appears to you to have any bearing on the events surrounding Bristol's alleged entrance into the conspiracy in December of 1955.

Now, as to this charge of withholding information during the Patent Office proceedings, I instruct you that those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have a duty to report to that office all material facts which are known to them and believed by them to be germane to their applications. They are required to disclose any prior art coming to their attention which might preclude the issuance of a patent. Note here that I have referred to material facts and that I will be adding some thoughts in a minute concerning this element of materiality.

As to alleged misrepresentations, I charge you that when an applicant, in response to an Examiner's question or request, or otherwise, *does* present *facts* to the

Patent Office, he should present those facts truthfully to the best of his belief and should not misrepresent them. That duty is breached when the applicant, or his representative, reports as material facts things he knows to be false. It is also breached when he reports as such facts things about which he has not made sufficient investigation to know whether they are true or false, particularly if it later turns out that information which should have come to his attention shows that the things he reported were not accurate.

However, the mere fact that statements made to the Patent Office were erroneous, or were not what the Patent Examiner asked for, does not make them intentional misrepresentations, unless the person making the statements did not have a bona fide belief in their truthfulness and their responsiveness.

Thus, an essential element of any charge that Pfizer or Cyanamid, or both, improperly withheld information from or otherwise misled the Patent Office is the establishment of an intent to deceive on the part of their representatives. The deception, if you find any existed, could not matter if it was merely accidental or negligent. It must have been the product of a conscious and deliberate intent to misrepresent by those prosecuting the tetracycline applications before Examiner Lidoff.

In addition, in order to constitute the kind of withholding or deception charged by the government in this case, the conduct must be such as intentionally to deceive the Examiner with respect to facts which, as I have said, are material. There must be, in other words, an intent to deceive the Examiner into granting a patent the issuance of which would otherwise have been refused or delayed for some substantial and uncertain period of time.

The charges of withholding and misrepresentation against Cyanamid and Pfizer all relate, as you know, to the information given by their representatives relating to the question of possible co-production or inherent production of tetracycline during the production of Aureomycin. The dispute between the government and these defendants centers upon what information was, in fact, of interest to the Examiner and whether the answers to his questions were deliberately unresponsive and misleading. You should be concerned then with what Examiner Lidoff wanted to know, only so far as he expressed what he wanted to know to the representatives of Pfizer and Cyanamid. The thoughts in Mr. Lidoff's mind are relevant only to the extent that they were communicated to these individuals. After determining what it was Lidoff wanted to know—as he expressed it—you must consider what the individuals with whom he spoke, in view of all the surrounding facts and circumstances, should reasonably have understood Lidoff to mean. Then, in the light of this understanding, you must determine whether the alleged withholding or deception, did, as a matter of fact, occur.

At this point it is pertinent to provide you with some additional information about Patent Office proceedings. Applications for a patent are filed in the Patent Office, which then examines each application and withholds issuance of a patent unless it appears that the applicant is entitled to one. When an application is filed it is assigned to an Examiner who specializes in the subject matter with which that application is concerned.

The scope of any patent is determined by its claims, the breadth of which depends on the inventor's contribution to a particular art. If the invention is a substantial advance, he may receive broad claims, if the

contribution is relatively narrow, there is a correspondingly smaller scope of patent protection. Patents usually have a number of claims which define the invention or parts of it in different ways, and which may vary in their scope.

The Patent Examiner's job is to try to determine the breadth of the claims to which an applicant may be entitled. He does this by studying the application and its claims in the light of prior art patents and literature which he has searched in an attempt to locate earlier disclosures of identical or similar subject matter.

If the Examiner believes that one or more claims should be rejected, he hands down a so-called preliminary rejection. The applicant then has the opportunity of seeking to persuade the Examiner that his rejection was in error as a matter of law or on the facts. The applicant may also, if possible, or desired, amend his claims in an effort to avoid the rejection. Thus, a preliminary rejection gives the applicant a chance to change his claims. It may also help to avoid appeals from erroneous rulings by the Examiner which he himself could rectify if they were pointed out to him. An Examiner cannot, under Patent Office practice, make a final rejection of claims until after he has examined or considered them at least twice.

Now, Patent Examiners differ in experience, ability and knowledge of the law. Like other people who must decide things, they are not infallible in their rulings. Some, including Mr. Lidoff, who had many years of experience and appears to have been regarded as an able examiner, occasionally base rejection on grounds which they recognize as questionable or unprecedented. Applicants have every right to argue, as I have said, the legal, or evidentiary, insufficiency of an Examiner's rejection. They may also appeal from an

Examiner's final rejection to the Board of Appeals in the Patent Office, and, if necessary, to higher courts outside the Patent Office. Of course, such appeals may involve considerable expense and require a good deal of time, so there is an obvious interest in obtaining a favorable ruling at the first level from the Examiner himself. Nevertheless, such appeals are frequently taken and they often result in reversal of the Patent Examiner's decision.

The Patent Office proceedings that concern us in this case involved several questions of law relating to the patentability of tetracycline and tetracycline hydrochloride. Since the government does not contend that the Pfizer tetracycline patent or any claim thereof is invalid, there is no issue in this case as to whether tetracycline was in fact patentable as a matter of patent law.

There were, however, some rather abstruse questions of patent law that played an important part in the relevant Patent Office proceedings. It seems fair to tell you that there were no mathematically certain answers to those questions, but it is also fair—and perhaps consoling—to tell you that it is neither your job nor mine to reach any definitive conclusions on these legal questions in this case. The legal problems are pertinent only insofar as they may affect your finding of the *facts* on this issue of alleged withholding and deception in the Patent Office.

Now, during the times in question, there was substantial basis for the view that under the pertinent patent law the prior unrecognized and undisclosed existence of a substance would not bar the issuance of a patent on that substance to an individual who first made it available to the public in useful form, or whose invention gave to it a new and different utility. It is also undisputed that the existence of another

antibiotic in commercial Aureomycin, or in commercial Aureomycin fermentation broths, was not recognized in the pharmaceutical art until after the filing of the original Conover or Pfizer application on tetracycline in October of 1952.

Another point which is not in dispute is that certain of the claims of the Pfizer tetracycline patent are narrowly directed to relatively pure product forms of tetracycline. As claimed by the inventor, Conover, these forms of tetracycline had a new and different utility from the old commercial Aureomycin containing small and unrecognized amounts of tetracycline.

Thus, according to the patent law at the time of the proceedings with which we are concerned, a showing that slight, unidentified, useless traces of tetracycline were formed during the earlier production of Aureomycin would probably not have made tetracycline unpatentable.

There is evidence, however, from which you may infer that Examiner Lidoff took the position, as a matter of law, that co-production of any identifiable amount of tetracycline with Aureomycin in the prior art processes of the Duggar and Niedercorn patents would preclude the granting of tetracycline product claims in the Pfizer and other pending patent applications. It also appears that the patent lawyers knew this was Lidoff's position, and that counsel for Pfizer disagreed with it, and urged him to change it.

Lidoff appears to have known that the Minieri application which was pending before him showed co-production of substantial amounts of tetracycline with Aureomycin. He also knew that Duggar and Niedercorn did not on their face disclose any such co-production. But he "speculated," in a word that's been used in this case, that Duggar and Niedercorn might have had co-production without recognizing it, and he

indicated that this might require a rejection of the tetracycline product claims.

At this point, the parties have one of their many sharp disagreements. Defendant Pfizer urges that when he spoke of co-production or inherent production, Lidoff was interested—and, under the law, could only have been interested—in the presence of recoverable, or appreciable, amounts of tetracycline. Defendant Cyanamid claims that Lidoff was interested only in whether tetracycline was present in commercial Aureomycin.

The government contends that under Lidoff's view of the law, the patentability of tetracycline might be barred even by a "wholly unrecognized occurrence of some ineffective amount of tetracycline" in the Aureomycin made in accordance with the processes of Duggar and Niedercorn. Lidoff's interest, claims the government, was not directed solely to the presence of tetracycline in commercial Aureomycin, but extended to whether tetracycline was present either in the Aureomycin fermentation broths or Aureomycin laboratory samples. And, it is urged, Pfizer and Cyanamid were aware that Lidoff was proceeding on this legal premise.

Now, your task, as I have said, is not to decide whether Lidoff was right or wrong on the law. Your problem is to determine, if you can, the position he adopted and communicated to the representatives of Cyanamid and Pfizer. Those representatives were required to take into account the view Lidoff communicated to them in determining what he meant and what facts they should deem material in their presentations to him, since he had the power to deny or at least postpone for some substantial period the issuance of a patent.

In light of what you determine on this subject, and based upon the other things I have mentioned concerning the Patent Office proceedings, it is for you to judge whether the evidence and arguments you have heard about the laboratory tests conducted by Pfizer, in connection with the fermentation broths and microorganism used, and the recovery procedures employed, persuade you that the representatives of Pfizer deliberately withheld or concealed material information from Examiner Lidoff.

You must determine whether the tests Pfizer's people made and reported were good faith efforts to give him the material information appropriate to surmount his rejection of the Pfizer application or whether, on the other hand, they deliberately used tests that were bound to give negative results and were calculated to distort or conceal material facts within their knowlege.

As to Cyanamid, you must determine whether Mr. Edelblute deliberately misled Lidoff with respect to the question of co-production, or whether he deliberately made representations to Lidoff without making sufficient investigation of scientific knowledge within Cyanamid to know whether his representations were true or false. In studying this subject, you should consider that after October 14, 1954, when the second interference was dissolved, the Pfizer application returned to ex parte and secret prosecution.

There is no evidence that Cyanamid had anything to do with the tests conducted by Pfizer during this period after October 14, 1954. However, you may also consider that Pfizer's representatives, in continuing this ex parte prosecution, relied, in part, upon statements submitted earlier—that is, before October 14, 1954—by Mr. Edelblute. In these earlier submissions, you will recall, Mr. Edelblute had stated that there was no evidence of inherent production

in the prior art processes and that in the laboratory of Cyanamid, the presence of tetracycline in the fermentation liquor or in the Aureomycin products made and sold had not been demonstrated.

But even if you find deception as claimed by the government, this alleged "means and method" can lend support to the government's case only if you also find that the deception was carried out pursuant to or in furtherance of the alleged conspiracy between Pfizer and Cyanamid. Fraud on the Patent Office is a very serious matter, with a variety of possible consequences that are not significant in this case, but such fraud is not in itself a Sherman Act violation of the kind that does concern us here. If you find such fraud, either by Pfizer or Cyanamid, or both—but if you find that it was accomplished for the separate and independent interests of either individual company in obtaining a patent—this becomes a matter of no weight whatsoever for the proof of any offense in this case. Only if you are persuaded on all the relevant evidence that the deception was carried out to effectuate the conspiracy (as the indictment charges)—only then may you treat this alleged "means and method" as a factor tending toward conviction.

Let me summarize this subject by saying that before you may treat the evidence under this heading as proof of guilt, you must find beyond a reasonable doubt three things:

First, that the representatives of either Pfizer or Cyanamid, or both, knowingly misrepresented or withheld material information from the Examiner.

Second, that but for such deception, the Examiner would not have allowed the Pfizer application on January 11, 1955, or for at least some substantial period thereafter.

Third, that such deception was practiced by either Pfizer or Cyanamid, or both, pursuant to or in furtherance of the alleged conspiracy.

I turn to another of the alleged means and method set out in the indictment. This charges and I quote, "Cyanamid acquired the competing Heyden patent application on tetracycline and abandoned the product claims therein." As you know, this allegation relates to the Minieri application, and you have heard evidence concerning the prosecution of that application and its inclusion in the second interference on tetracycline hydrochloride.

As to the acquisition of this application, you will recall that it was part of Cyanamid's purchase from Heyden of all of the latter company's antibiotic facilities for a purchase price somewhat in excess of $12,000,000, exclusive of inventories. You will recall that the contract for that purchase was made on approximately November 4, 1954; that the value assigned by the parties to Heyden's various patent rights, processes, and other intangibles (among which were included the Minieri application) was approximately $2,000,000; and that the testimony indicates that the application was not seen by Cyanamid's representatives until the closing of the sale on December 1, 1953.

As to the pertinent law, I don't believe there is a great deal that needs to be said on this particular subject. You will understand that there is no claim that there is anything unlawful in this particular acquisition standing by itself. You have been made aware of the Government's contention that Cyanamid acquired the Minieri application as part of the overall plan and agreement with Pfizer to obtain exclusive power over the manufacture, sale and distribution of tetracycline, with the purpose of using this power to bar competitors or fix the prices on antibiotics and antibiotic

products. You will recall that part of this charge is that it is as part of that effort the Minieri product claims were abandoned in the patent office. It seems sufficient to say on this item that you may consider it together with all the other circumstances in the case, and determine in your judgment whether it has any tendency to establish the ultimate and critical element of conspiracy.

Another means and method alleged in the indictment is that, in effectuating the conspiracy, and I quote again, "Pfizer, Cyanamid and Bristol suppressed litigation involving the validity of Pfizer's tetracycline patent."

Now, the word "suppressed" in this sentence of the indictment is a word that carries connotations of impropriety and wrongdoing. But all of us, and you, the jury, understand that certainly by this time that the purpose of an indictment as a whole is to make allegations of wrongful or unlawful conduct. And so you will understand equally that the particular words of an indictment, like the substance of the accusations, are in themselves no evidence that the defendants on trial did anything unlawful.

The question under this particular heading is whether the settlement of the lawsuits to which this allegation relates—viewing these settlements in light of all the preceding events, the negotiations leading to them, and all the surrounding and later circumstances—were designed and intended to build or further the conspiracy charged in the indictment.

You will recall that the lawsuits in question were the several patent suits begun on and after January 11, 1955, between Pfizer on the one hand and Bristol, Squibb and Upjohn on the other. You will have noted, and you will bear in mind, that the de-

fendant Cyanamid was not a party to any of these litigations.

You will also recall in this connection my earlier instructions about licensing agreements and about the patent laws generally. The written agreements entered into between Pfizer and Bristol, Squibb and Upjohn and the terms of the settlements—settlement—I guess "settlements" is correct—were by themselves completely lawful. They would only be unlawful if entered into pursuant to, or as part of, a conspiracy to exclude other companies or to fix prices.

Appraising these settlements, you will have in mind that the litigation is expensive, time-consuming, and disruptive of the conduct of business. Although it is sometimes necessary, it is a burden to be avoided where possible. Good faith settlement of litigation is perfectly legal, beneficial to the economy, and in the public interest. It is not extraordinary to have patent lawsuits settled with the alleged infringer taking a license and agreeing to pay a royalty, and such settlements are consistent with the public interest unless they are used to conceal some fraud on the patent office or as means to some other illegal end.

You will recall and consider the Government's contention that it was the settlements of December 1955 formalized in March 1956 which brought Bristol, Squibb and Upjohn into the alleged conspiracy. However, whether or not you find that there was such a pre-existing conspiracy to join, the settlements in themselves are not a basis upon which you can find the entry of Bristol, Squibb and Upjohn into a conspiracy. On the other hand, as I have mentioned to you before, actions taken to further or effectuate a conspiracy may be actions which are, standing alone, perfectly consistent with the law. And so the particular problem at this point is the pervasive question

throughout, whether these particular actions—the settlements and settlement agreements—were actions of the kind to further or effectuate a conspiracy.

So here, once again, you must put the problem to yourselves in the context of all its details and circumstances. You may consider in this connection that the outcome of litigation is commonly unpredictable; that on the record as we have it, it was at least a debatable question whether Bristol or Squibb or Upjohn could obtain a declaration that the Pfizer patent was invalid or could succeed in having the patent held unenforceable against them on any ground. You may consider that the issues were complex, lengthy, and difficult both factually and legally.

You may consider that Bristol, Squibb and Upjohn raised a number of contentions to resist enforcement of the patent; that they charged it had been obtained by fraud; that they had hopes of obtaining a declaration that it could not be enforced because it was involved in antitrust violations; and that they may have had other grounds of law or fact upon which they might have hoped to succeed. While you may consider these various theories and the contentions and the pleadings that are in evidence before you, such allegations by these companies against Pfizer are not binding on them by estoppel, as lawyers say, or in any other way.

In considering the settlements and the negotiations that preceded them, the government has placed before you as part of its case, and you may take into account, that lawyers participated in these negotiations, and you may consider the extent, if any, to which the negotiations were conducted without the participation of lawyers. You may consider, as I have said, the events before the negotiations—the extent to which the parties fought each other, the vigor and intensity

of these struggles, and the extent to which, and the circumstances in which, their attitudes of hostility and intransigence may have changed prior to December of 1955.

In connection with the facts surrounding these events, including the wiretapping episode about which you have heard, I charge you that under the law if a court in an infringement litigation is persuaded that the holder of the patent has been guilty of unconscionable conduct relating to his attempts to enforce his patent rights, the court may invoke a doctrine known as "unclean hands" and on that ground refuse to enforce the patent.

It is also the law that use of improper means to obtain confidential business information of a competitor may provide the basis for a claim for substantial damages. You will understand that this proposition has a possible bearing on the subject of the Broady wiretapping episode. But I also instruct you at this point that while this wiretapping evidence was received, it was strictly received as one of the circumstances bearing upon the settlement entered into between Pfizer and Bristol. You should have in mind that neither Pfizer nor any officer or employee of Pfizer was ever charged with this wiretapping, and that no one is on trial in this case for wiretapping. The question of what Broady actually did and at whose instance is not before you as such, and is not to be considered by you in weighing the evidence as to whether or not the conspiracy alleged in this case has been proved except as it bears on the settlement and the settlement agreements of December 1955 and March 1956.

In this same connection, you have heard evidence and argument concerning the filing of the depositions in this courthouse by Bristol, on instructions of Mr.

Schwartz, following the settlement. You may consider this as one among the several pertinent circumstances.

I inform you on this subject that the Federal Rules of Civil Procedure require such filings of depositions in court, but that this requirement may be and frequently is waived by agreement between the parties in civil litigation.

In weighing the Government's charges with respect to the litigation settlements, you should consider not only the terms of those settlements but how the settlements later operated and how they may have related to all the other facts of the parties' relationships to each other and their relationships to the market with which this case is concerned. You should, for example, take into account how the terms of the settlements bore upon the sales of bulk tetracycline and tetracycline products. You should consider how the parties after the settlements conducted their business in bulk and product sales. You should appraise the significance in this context of the fact that Bristol was the only seller of bulk, and that neither Cyanamid nor Pfizer had any of this business during the period covered by the indictment. You may consider the evidence that shortly before December 1955 Upjohn sought from Pfizer a license to manufacture tetracycline, but that Upjohn and Squibb received in the settlement only licenses to compound, use and sell products, so that they had to have some manufacturer as a source of the bulk material. You may consider the prices of the bulk and the evidence as to profitability of Bristol's bulk sales.

You will want to make a judgment, in short, as to what light, if any, is cast upon these settlements by the facts surrounding them, and, conversely, judge whether the settlements themselves tend in any way to

give particular meaning or color or significance to other facts in the case.

Moving to a further item in the indictment, another alleged means and method of effectuating the conspiracy is charged in the following language, and again I quote: "Bristol sold bulk tetracycline only to Upjohn and Squibb. Each of the defendant companies refused to sell bulk tetracycline to all others except that Cyanamid sold a large amount of bulk tetracycline to Pfizer in early 1954 in assisting Pfizer to make a prompt entry into the tetracycline product market."

Now, it appears to be undisputed that except for the single bulk sale by Cyanamid to Pfizer in early 1954, Bristol was the only seller of bulk tetracycline and that the only customers to whom such bulk was sold were Upjohn and Squibb. So far as the law is concerned, it is also undisputed that a seller, in the absence of an unlawful conspiracy, has a perfect right to choose his customer as he will, to sell to nobody or to sell to one or more customers and refuse to sell to others. It follows, as with so many other aspects of the case, that the significance of this particular item, if any, is to be found in its setting, in its context, in its interrelationship with other facts that have been received in evidence.

The documents show that as part of the agreements leading to the settlement with Pfizer, Squibb and Upjohn agreed to purchase their bulk requirements from Bristol for a period of three years following the settlement agreements which were finally concluded in March of 1956. You have learned that these all-requirements contracts were each extended for a year at a time into 1960 and 1961. You have heard about the degree of profitability of the bulk sales to Bristol, and you have heard the explanations by

Bristol's officials of why that company chose to seek two bulk customers and no more.

The Government also relies in this connection upon the agreement between Pfizer and Cyanamid embodied in the written contract of January 11, 1954, providing for arrangements, you will recall, on the settlement of priority on the tetracycline patent claims and including a granting of licenses under the existing aureomycin patents of Cyanamid and including a further agreement that whichever company obtained the tetracycline patent would license the other on stated terms. As part of these arrangements, there was an arrangement, you will recall, for the sale of bulk for some $3,800,000 by Cyanamid to Pfizer, enabling Pfizer to be on the tetracycline market sooner than it might otherwise have been. And you have been told of the pre-existing policies of Cyanamid and Pfizer against bulk sales of their antibiotic products.

There has been testimony that Pfizer, prior to the settlement with Bristol, Squibb and Upjohn had expressed some interest in obtaining bulk orders from Upjohn. But the evidence does not reveal that either Cyanamid or Pfizer, during the period covered by the indictment, sold any part of the bulk tetracycline bought by Squibb and Upjohn, and neither of these defendants, Pfizer and Cyanamid, appear to have sold bulk tetracycline to any other company.

I have mentioned only an outline of the facts relating to this particular subject. You have heard about it more extensively in arguments about the evidence and about the conclusions to which the evidence should lead you. All relevant evidence and your recollection of it will be part of your consideration as you undertake to consider whether this situation concerning bulk tetracycline reflected only normal and lawful business conduct by the several companies involved, or

whether it tends to show the presence of the conspiracy the government alleges or whether it shows nothing either way.

Closely related, and essentially part of the same subject, is the government's charge of another means and method by which it says this conspiracy was effectuated—namely, the agreements between Bristol on the one hand and Squibb and Upjohn on the other whereby the latter two companies were required to purchase their requirements of bulk from Bristol. I have mentioned these. They are set out as the separate alleged means and method.

Now, while the original three-year contract remained in effect, and during the annual extensions in 1959 and 1960, Squibb and Upjohn were precluded by the contracts from purchasing bulk tetracycline from any company other than Bristol. I charge you, however, that in the circumstances of this case, these particular all-requirements contracts were not unlawful when viewed by themselves. They could become unlawful only if they reflected, or tended to effectuate, some agreement or understanding among the companies involved by which they undertook to confine the bulk sales business to Bristol or to exclude other potential competitors and purchasers of bulk from the tetracycline market.

Now, similar considerations to those I have been stating and repeating apply to the next of the means and methods alleged in the indictment. This charge is as follows:

> Pfizer issued licenses to Upjohn and Squibb, respectively, limited, however, at Bristol's request, to the sale of tetracycline products.

I have mentioned many times that Pfizer, as part of its rights under its tetracycline patent, could lawfully issue licenses as it saw fit so long as these li-

censes and their limitations were given in the exercise of independent business judgment. It was not privileged, however, to agree with a licensee such as Bristol that it would deny or restrict licenses to other competitors such as Squibb and Upjohn.

Accordingly, the vital part of this allegation on the government's theory of the case is the contention that this restriction forbidding manufacture by Squibb and Upjohn was imposed at Bristol's request and as part of an understanding among the parties that Squibb, Upjohn and other potential competitors would be excluded from the grant of tetracycline manufacturing rights.

There is nothing wrongful in itself in the fact that the licenses issued to Squibb and Upjohn were requested by Bristol as part of Bristol's privileges and obligations under its arrangements with Squibb and Upjohn for the settlement of the litigation. The critical inquiry on this score is whether the limitation on Squibb and Upjohn, which barred them from manufacturing, was the particular objective of Bristol and was an agreed objective between Bristol and Pfizer in the issuance of that license.

I come finally to the last three of the means and methods charged in the indictment. These relate generally to the prices and merchandising practices of the defendants and the alleged co-conspirators, and I will read all three before proceeding to give you some additional instructions on them.

The first of these is that:

> Pfizer and Cyanamid maintained substantially identical and unreasonably high prices on Terramycin products and Aureomycin products, respectively.

The second says this:

> Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its tetracycline products on the market at prices which were substantially identical with each other and which conformed to the prices of Terramycin products and Aureomycin products in effect as of November 1953, and all these companies maintained such substantially identical and unreasonably high prices until at least July 1960.

The third says this:

> Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its tetracycline products on the market in dosage forms and customer classifications substantially identical with the Terramycin product and Aureomycin product dosage forms and customer classifications in effect as of November 1953, and have continued to use such substantially identical dosage forms and classifications to date—

meaning, of course, to the date of the indictment in August 1961.

Now, the third of these allegations—as to dosage forms and customer classifications—seems to require relatively little comment in itself.

It was obviously lawful, as a fact standing alone, for each defendant to copy dosage forms, package sizes, customer classifications, or all three, as they were used by its competitors, so long as this was not done to implement an agreement fixing prices or excluding competition among the alleged conspirators or with other possible competitors.

The question is whether these uniform practices and merchandising techniques were adopted in order to effectuate a conspiracy among the defendants and the alleged co-conspirators. Uniformities of this kind, in themselves, may point either way. By making com-

parisons easy, and thus making clear to everyone what others are doing, they may serve actually to facilitate competition. Or, viewed in their setting, they may serve to supply mutual assurance that uniformity is being maintained and that competition is being avoided. The question is put to you once more whether this specific detail and the others reflect the kind of mutual understanding and action in concert charged by the government as the fundamental proposition in its case.

Is this the time we ought to break again? How many think yes in the jury box?

(No response.)

The COURT: I will go on.

Now, as to the allegations concerning prices, these require somewhat more extended comments which is what led me to think that we might be at a point for a break. But before proceeding to the specific subject of prices, let me touch briefly on the government's related contention that broad spectrum antibiotic sales comprised a major portion of the business, and a major source of the profits, of the defendant companies in varying proportions with respect to each about which you have heard.

These assertions, to the extent they are borne out by the evidence, may be considered as part of the general background and setting in which the events of the case transpired. Such evidence may also serve as some evidence of motive, which is always a relevant concern and which has been argued at some length by government counsel. But you will also understand, of course, that the existence of a motive does not serve in itself to establish the commission of any offense charged, or any element of any such offense.

So I turn to the charges concerning prices as such, including the assertion that the prices here in ques-

tion were substantially identical and "unreasonably high." I have touched on this subject already, but it is necessary to expand at this point on the earlier thoughts I have given you.

On the question of uniform or substantially uniform prices you must, of course, make a determination as to the extent to which such uniformity has actually been shown by the evidence. You will want to consider each of the several customer classifications and consider in each instance how far the prices charged were shown to have been identical. You will take into account evidence of variations and divergences in the prices to any of the several classes of trade.

You will recall on this subject that agreement among competitors on prices is forbidden by the Sherman Act even if such agreement does not extend to all classes of trade or all groups of customers. You will also recall that identical prices among competitors are not in themselves proof of conspiracy. Such prices, as I have said already, may result from competition or from agreement, and the question to ponder is which explanation accounts for such uniformity as you may find in this case.

In studying this subject, you will want to take into account, in addition to the question of uniformity, what the evidence shows as to the stability of the prices in question over substantial periods of time. You will want to reflect on the question as to how such stability in price fits with such evidence as you have been shown concerning changes in market conditions that might have had some effect on price, such conditions as total demand for the commodity, the relative and changing shares of the companies involved, changes in production or other costs, and any other

factors which might have had a tendency during the period to cause price changes.

You may consider that the prices, insofar as they were stable, were not raised as well as not being lowered, and consider whether a conspiracy, in the context of this case, might have been expected to result in general price increases. You may ask yourselves, viewing the evidence on this subject, whether price cuts or price changes of any kind would seem to have been indicated or desirable for any of the companies involved from the viewpoint of their individual self-interest. What advantage or disadvantage, if any, would have accrued from such changes by any or all of the companies?

There has been some evidence of specific price changes, and some evidence that changes were effected by several companies at or about the same time, during the period which concerns us. You will take this into account along with everything else. You may consider in this connection any actual experience of these companies with price increases or decreases, the extent to which such price changes were followed or not followed, and any impact of such changes upon the relative positions of the companies in the relevant market.

You have heard evidence and argument concerning competition among the defendants in various respects, including matters affecting price. For example, the giving of free goods obviously has its impact upon price. If you buy a bottle for $1.00 and get one free with it, the net cost of each, as I think we can agree, is 50 cents. So you will want to consider the evidence you have heard concerning free goods, the extent to which such goods were given, and the extent to which they were not.

We have learned that the companies competed through the activities, among others, of their forces of

detail men. There is evidence that each company sought to capture business from the others by promoting its product with doctors and others who affected consumption of antibiotics.

I have mentioned earlier that the Sherman Act makes agreements on price unlawful whether or not competition is maintained with respect to matters other than price. But you will want to judge in this case whether the specific evidence you have heard concerning competition of any kind was consistent or inconsistent with an agreement on prices.

You will recall from the figures which seems largely undisputed that the relative market shares of the several defendants changed over the period involved in the indictment. You may take this in account, view it in relation to the price history and all the other facts you have heard, and determine whether this is consistent or inconsistent with the conspiracy alleged by the government.

I come now to the allegation among the asserted "means and methods" that defendants maintained prices which were "unreasonably high." It is necessary to leave you with several thoughts concerning this specific topic.

To begin with, I must emphasize and be sure you understand with perfect clarity, that neither the Sherman Act nor any other law that concerns us in this case imposes any limit on the price a company may charge for its commodity. So far as the law is concerned, so far as we have it for this case, a manufacturer is perfectly free to produce a commodity that costs him a dollar and sell it for $100 if he can find customers willing to pay that amount.

The Sherman Act does not entitle any court or any jury to impose personal or private or any other kinds of restrictions upon the setting of prices by business-

men exercising their independent and competitive and self-interested judgment. It would be utterly wrong in short for any of us to be influenced even in the slightest degree in this case by any notion that drug prices were too high or too low or even just right, and I add those words "just right" to be sure that we return to and stay centered upon the true problem in this case, and that is the subject as I have repeated it over and over again, of alleged price fixing by agreement.

I have told you before, and stress it again, that this is the kind of conduct against which the Sherman Act is directed in the aspect of present relevance. If prices are fixed in the way forbidden by that Act, it makes no difference that they are fixed at a happy or low or suitable or high and unpleasant level. Price fixing at any level is what is outlawed.

I am trusting that you have these repeated thoughts firmly in mind. I return then to the question of what significance, if any, there may be in this case in the charge that the defendants' prices were "unreasonably high."

In the light of what I have just said, I think you will find it helpful to translate the word "unreasonable" to mean "unusual" or "artificial" or "extraordinary." By these suggested definitions I am trying to convey the thought that the idea of unreasonableness in the present context is meaningful only if it is understood to refer to kinds of price behavior or price levels which appear to be divorced from variations and differences in available supply or demand or cost or other economic factors that may normally be expected to cause variations or changes in the prices charged in a competitive market.

To put the thought in another and slightly shorter way, the charge of unreasonableness in this case is

material only insofar as it poses the issue whether the prices involved exhibited qualities or peculiarities of a type that could be deemed evidence that such prices resulted from agreement rather than from competition.

This is the basis, apart from the subject of motive, upon which I have allowed evidence to be placed before you concerning the various cost and profit data of the several companies.

Through such evidence the government has attempted to establish that the prices of broad spectrum antibiotics remained stable over a long period of time despite a wide disparity among sellers in production costs, despite reductions over the period in such production costs, substantial difference between production costs and sales prices, fluctuations in market shares among the sellers, and changes in overall demand for broad spectrum antibiotics.

There has been evidence of so-called "production costs" or "factory" or "standard" costs from records kept by the companies, and comparisons in these records between such costs and selling prices. Many of these records omit many factors that should be included in costs in order to compute net profits. Such factors, without exhausting them, were research, promotion expenses, and other kinds of costs. You should have these omissions in mind and take them into account when you consider the figures I have just mentioned.

Taking such figures, the government sought to show that the gross profits they reflect were substantially greater for the products here in question than for other products made and sold by the defendants. In addition, from similar data for Squibb and Upjohn, the government has sought to show that costs of those two companies were far higher than those of the

defendants, and the government argued for an adverse inference from the evidence that the prices of all five companies tended to be uniform despite these cost differences.

The government claims that there is further evidence of a lack of price competition in the fact that the prices of broad spectrum antibiotics were maintained over a long period of time at an artificial level which enabled Squibb and Upjohn to earn normal profits despite their higher costs, while the defendants were able to earn what are alleged to have been unreasonably high profits.

You will understand that it is the fact to which those allegations relate rather than the words in which they are couched which I take from the government contentions which are critical items for your consideration.

On this same subject, there is evidence of overall net profit figures for Cyanamid by various product groups, and gross and operating profit figures comparing Pfizer's antibiotic drugs with its other products.

Relying upon the data offered by the government, Bristol has argued that its profits on tetracycline were actually in line with its profits on other products. Similarly, Pfizer, at the end of the case, undertook to show that Terramycin and tetracycline did not in fact yield disproportionately high profits in comparison with other products.

More generally, the defendants maintain that the evidence in question does not have the meaning attributed to it by the government and that it does not warrant the government's inferences in any event. Defendants emphasize that the cost data taken from the company records relate only to partial costs rather than total costs of production.

They maintain that comparisons between such costs and selling prices lead to distorted conclusions as to so-called gross profits. Properly understood, the defendants say, the figures show profits that are not meaningful at all and not in any sense unreasonable or unusual or artificial.

Furthermore, the defendants contend, it is neither good law nor good economics to demand a close and uniform relationship between production costs and profits. They point out that competition in the marketplace commonly results in uniform prices even though the various sellers who compete would not normally be expected to have identical or even closely identical costs of production.

In considering this subject, as with others, you will want to weigh and appraise all the evidence and arguments, including all the data from defendants' files as have been made available comparing gross profits or other margins on broad spectrum antibiotics and any comparisons that seem to you to be significant between these figures and others in evidence that have been submitted to you.

On the basis of all the evidence, the ultimate facts about the level and quality of prices and profits and the proper inferences as to the offenses alleged in the indictment, are to be determined by you, the members of the jury.

First, it is for you to decide, appraising all the facts and figures that have been placed before you, whether the prices charged and the profits earned by the defendants were unusual or artificial or extraordinary or unreasonable in the sense in which I have undertaken to define these alternative expressions for you.

If you answer this question in the negative, this is enough to eliminate these price and profit contentions

from the evidence in support of the government's case.

If you answer the question affirmatively, if you decide that the prices were unreasonably high in the sense in which that phrase applies to this case, you must then weigh the impact, if any, that this determination should have on your decision of the ultimate questions in the case.

Unreasonably or extraordinarily high prices or profits charged uniformly by competing sellers over a substantial period of time may be evidence, taken with all the other circumstances of the case, supporting an inference that the parties had an agreement rather than a competitive situation with respect to prices.

Such evidence, in the context of the whole case may, and I emphasize may because this is for your judgment, may also support the charges in Counts 2 and 3, alleging, as you recall, conspiracy to monopolize and the achievement of an unlawful monopoly. All of these questions as to this item of evidence are left with the inferences you find you should draw in your good judgment.

You will recall in this connection my last reference to the count relating to monopolizing, that the crime of monopolization requires proof in this case of a combination or conspiracy to monopolize, plus joint possession of monopoly power by the members of this combination or conspiracy, and that I have defined monopoly power as being the power to control prices and exclude competition. In this case I have indicated that it is relevant to show that the defendants earned unreasonably high profits as part of the government effort to show that they conspired to obtain and did obtain a monopoly. The success of that effort is for you to judge.

To conclude finally on this subject of prices as alleged means and methods of effectuating the conspiracy, let me remind you that you should consider all of the documentary evidence and testimony bearing on what prices were actually published and actually charged in the various markets; what price changes were in fact made; what considerations entered into the various decisions with respect to prices; the competitive situation in which prices were charged; the market conditions in the various classes of trade and various markets; the peculiarities and purchasing habits of the different kinds of customers in the various markets; and all other matters which might have affected businessmen's decisions with respect to pricing.

Take all of these things into account along with the evidence you have heard on the relative levels of prices, costs and profits in reaching your ultimate judgment as to whether this evidence tends to show the presence or absence of the conspiracy charged by the government and whether it tends to show, along with the other pertinent elements, the existence of monopoly power as charged in Count 3 of the indictment.

Now, since you have waited so patiently and since I am approaching an end, and since we will need a recess when I do end, may I keep you and conclude this charge?

All right. As I told you, I finished with the subject of prices and I have concluded at this point the subject of means and methods as alleged in the indictment.

In discussing that subject, I have made some limited references to the evidence, and I want to mention now in the same limited way just a few additional categories of the evidence, and to leave you with some final thoughts about how these may enter into your final deliberations.

You have heard evidence about meetings held between principal officers of the defendant companies, and evidence concerning the events leading to, and things that happened at and after those meetings. You will recall that the government places the inception of the alleged conspiracy between Pfizer and Cyanamid at the meetings and negotiations of November 1953 leading to the licensing and bulk sales arrangements concluded at that time.

Similarly, you will recall that the alleged entry of Bristol into the conspiracy, along with Squibb and Upjohn, is dated from the time of the meetings between Schwartz and McKeen and others on December 14 and 15, 1955, when the agreements were negotiated.

I told you earlier that proof of a conspiracy does not necessarily require proof of express agreements or proof that the alleged conspirators had any face-to-face meetings at all. At the same time, meetings between competitors may supply, as you know, an opportunity to make either lawful or unlawful agreements. You will understand, however, that evidence of such meetings could not in itself establish the existence of any unlawful conspiracy. In weighing the significance and meaning of the meetings in this case, you will consider the extent to which you have heard legitimate business purposes for them, the events that came before, and the events that came after, the extent to which the conduct of any of the companies involved remained the same or changed in the times preceding and following such meetings, the public or private statements the parties may have made touching the subject matter of their meetings—and, as usual, and still important, all the surrounding circumstances.

Along with all the other evidence in the case, you have heard the sworn testimony of the principal officers of the three defendant companies, and you have heard each of them deny in broad terms that there was any understanding or agreement among them, either express or implied, that there would be uniform and identical prices, or that there would be any exclusion of competitors, or that they would seek together in any way to achieve monopoly power. You must, obviously, give due and deliberate thought to this testimony, and ultimately attribute to it such weight as it merits in your impartial judgment. In performing this task, you will have in mind the definition of a combination or conspiracy as it has been given to you in these instructions, recalling, among other things, that the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter. You will take into consideration, also, that if all the elements are shown to establish a conspiracy, it would make no difference that the conspirators did not believe they were violating the law or intend to commit such a violation.

This is by no means to suggest to you that you overlook or reject the sworn testimony of defendants' officers. That's for your judgment, not mine. The point being made here, as you understand, is that assertions of innocence by such officers may reflect partly legal as well as factual contentions and must be weighed along with all the evidence of every kind that has been submitted to you.

I come to one final observation I want to make in these instructions about something included in the evidence you have heard. There has been evidence

about Parke, Davis and about Chlormycetin, the broad spectrum antibiotic which is alleged to have comprised part of the market involved in this case. You have learned that Parke, Davis was a substantial factor in that market, and I have mentioned the possible significance of that situation as it affects the question of monopoly and may affect other issues in this case. We have heard of various respects in which the practices of Parke, Davis as to dosages and prices and marketing techniques paralleled those of the defendants and of Squibb and Upjohn. We have also heard some evidence and argument concerning the differences between Parke, Davis and the defendants on trial here. You are aware, as counsel for both sides have stated, that Parke, Davis is not alleged to have been a member of the conspiracy charged by the government.

Now, insofar as Parke, Davis and its activities were material factors in the market which concerns us in this case, the facts about that subject have been placed before you and are part of the total evidence you may consider in reaching your judgment. However, the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direction as a fact in itself. There is no profit here in spectulating as to why Parke, Davis was not indicted. Parke, Davis is not on trial here, and the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them as they have been presented to you in this courtroom.

I must remind yon now that my comments touching the evidence have been limited, and have served limited and special purposes. They have been presented to you to give you such assistance as I could in formulating the issues you are to consider and in

outlining the extent to which, and the purpose for which, particular kinds of evidence may be deemed to be relevant. I have omitted many things in this discussion so far as the evidence is concerned. The fact that I have mentioned something should not magnify its importance to you; that fact that I have omitted things should not make them seem unimporant to you. Some things I have mentioned may seem in the end to be of relatively little consequence in your controlling judgment; things I have not mentioned may turn out to be relatively decisive in that judgment.

If anything I have said about the evidence differs from your recollection, remember it is your recollection that controls. If anything I have said creates some uncertainty for you, ask for the pertinent exhibits or ask to have the pertinent testimony read to you. I remind you, in short, that your recollection of the evidence, the weight to be given to any particular item of evidence, and the ultimate impact of the whole record in finding where the truth lies are matters for your exclusive and sovereign judgment.

Let me remind you also, though it is repetitious, that while we necessarily speak of things one at a time, your final decision, as counsel for both sides have mentioned to you, must rest ultimately upon your appraisal of this large record viewed as a whole. Whichever way your ultimate verdict may go, it should be a verdict based upon a total picture, constructed from all the evidence in the case. If that whole picture leads you to the belief that these companies engaged in normal and lawful competition, or leaves you with a reasonable doubt whether the government has proved otherwise, then it is your duty to acquit. If that total picture, taking all the separate details together, established beyond a reasonable doubt any or all of the

offenses charged, then, as I have said, it becomes your duty to convict.

A few more general things and I will be through, members of the jury.

On the subject of credibility. In resolving conflicts in and about the evidence you have received, you will obviously be concerned with this subject of credibility, with appraising the credibility of the witnesses who appeared and testified before you. Problems that we put under the heading of credibility comprise one of the most basic and lasting reasons for our bringing twelve non-professional people of good sense and wide experience into the courtroom to decide issues of the kind you are having before you.

There is nothing technical or legalistic about this subject of credibility. Jurors are called upon, as I have said, to bring into the courtroom the everyday good sense they use in conducting their own serious affairs. You have heard the witnesses on the stand, and you have observed the manner in which they testified. It is for you to ask yourselves how each witness impressed you. Did he appear to be truthful, candid, frank, forthright? Did he appear to know what he was talking about? Did he, above all, impress you as having a purpose to report his knowledge accurately and truthfully?

These are the kinds of familiar questions you will ask yourselves and reason on together in deciding which witnesses gave you honest and correct accounts of the facts.

In determining the extent to which you will credit the testimony of any particular witness, you may consider the inherent probability and consistency of that testimony, its corroboration or lack of corroboration by other evidence, including the documentary exhibits that have been placed before you.

Your experience tells you that the credibility of a person may be affected by the nature of his interest in the subject matter. You would surely have this in mind whether or not it was mentioned in instructions. And you would equally know from your own experience that while interest may affect a person's testimony, the fact that a person is interested is not a ground in itself for concluding that his testimony is not reliable. If that were so, we would never listen to interested people in trials in our courts. I simply mention this factor of interest, among all the others, as things that may enter into your appraisal and deliberations concerning credibility.

If you conclude that any witness has been discredited in any degree, it is your exclusive province to give his testimony such credence as you think it merits. If you find that a witness has wilfully testified falsely to any material fact, this may lead you to disregard all his testimony, or you may accept such part of his testimony as you believe worthy of acceptance. This is a matter, like the others, for your good sense and your good judgment.

You will remember in this connection that no witness is entitled in advance to greater or lesser credence because of the party that called him or because of his employment or other associations. The fact that a witness was called by the government does not in itself entitle his testimony to more weight or credence than that of any other witness who might appear before you. Similarly, the fact that witnesses are or have been associated with the defendants should not in itself diminish or enhance their credibility. All the witnesses must be judged by the tests of common sense and your experience in dealing with people and determining the extent to which you feel you may rely upon them.

Now, I have told you many times during our weeks together to refrain from discussing the case until the evidence and the arguments were all in. That instruction is, of course, about to be exactly reversed. When you go to the jury room, it is expected that you will discuss the case fully and exchange views with your fellow jurors. This is obviously the essential purpose and essence of jury deliberation to discuss and consider the evidence together and listen to the arguments of your fellow jurors. It means, naturally, that you will present your own point of view as well as listening to and considering others.

If after discussion with your fellow jurors you find that an opinion you had tended to hold is erroneous, you must not hesitate to change it in all good conscience. The objective is to reach agreement, if you can, but only on the evidence and only if you can do so without violence to your individual judgment.

So while you should fairly consider all points of view that you hear in discussion, you are not expected to yield your conscientious opinion simply because you are outnumbered or outweighed. Your vote has to be determined in the end by what you are convinced is the correct way to decide the facts under the evidence, under your oath, and under the instructions I have given you.

Now, you undoubtedly know that in order to return a verdict your decision must be unanimous, and I remind you that in seeking a verdict you must consider each defendant separately in connection with each of the three counts in the indictment. Ultimately, therefore, you will report three separate determinations for each defendant, or a total of nine in all.

Let me remind you for the last time that no defendant may be convicted in this case on any of the counts unless you find at least two of the defendants guilty

on that count. Accordingly, your verdict on any of the three counts may be an acquittal of all three defendants, a conviction of all three, or conviction of two and acquittal of the remaining defendant. You may not on any count find one defendant guilty and the other two not guilty.

Finally, as to the mechanics and equipment for your work together, it is plainly not necessary or suitable to send all the many exhibits with you to the jury room. If and when you have need for any of them, send a note and we will supply them to you, though I might say, it might take a bit of time for able counsel to collect them, but we will do that at your request. If you need to hear any of the testimony again, send a note and we will have it read to you. If you find during your discussion that anything said in these instructions, as well may be, requires clarification, send a note about that, and I will attempt to give you such additional or repeated guidance as I can.

* * * * *

I have concluded that you have enough in the way of instructions. I will ask you to remember that in addition to trying to put the case together as a whole, you must try, as nearly as you are able to, to consider those instructions as a whole and not break them into too little pieces and you try and decide the case.

I think I must or should emphasize to you finally, and again, that when I have touched on evidence, it has been primarily to try to bring these issues into focus and try to help you with your difficult task. I have tried to give you evidence relating to particular issues more or less on both sides, but it is not only my job but the fact about my own personal condition on this case that I am absolutely impartial, and I make no effort to intrude on your province of finding a ver-

dict, and so, if ever I have missed—and I stated this generally—in trying to tell you what evidence seemed to be on each side of any question, please remember that it is for you to weigh all the evidence, and not be guided or concluded or controlled in any way by my illustrative or partial pictures of that evidence for the special purposes of my instructions.

It is your weighing, your recollection, and your thorough canvas of that evidence that counts. All I can say, as earnestly as I can put it, is that I mean exactly this: In this case, neither the judge nor any member of the public, official or otherwise, is pushing you toward or expecting any determination one way or another, except your impartial determination of what you think to be the truth in the light of this case under my instructions as you find them from all the evidence.

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APPENDIX E

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of April, one thousand nine hundred and seventy.

Present: Hon. LEONARD P. MOORE, Hon. HENRY J. FRIENDLY, Hon. PAUL R. HAYS, *Circuit Judges.*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY, BRISTOL MYERS COMPANY, DEFENDANTS-APPELLANTS, JOHN E. MCKEEN, WILBUR G. MALCOLM, FREDERIC N. SCHWARTZ, DEFENDANTS

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO, *Clerk.*

U.S. GOVERNMENT PRINTING OFFICE: 1971